Supreme Court, U.S.
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No. (1)

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In The

Supreme Court of the United States

October Term, 1994

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C.; THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN; and ALAN D. EISENBERG, S.C., a Wisconsin service corporation,

Petitioners,

vs.

KATHALEEN A. BASSLER-HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR-KUEHL,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, supports attorney's fees for work performed on issues which failed to produce any significant positive result?

2. Whether the district court abused its discretion in awarding attorney's fees by using a ratio of successful claims to total claims where the lodestar amount could not be calculated due to the lack of adequate records and documentation of time expenditures maintained by respondents' attorney, particularly where the proration treats all claims, including attorney's fees, as having equal value at all times, regardless whether related to actual work performed or result accomplished?

3. Did the district court improperly interpret ERISA as permitting statutory penalties to be quintupled where a request for information from the group representative was couched as being made on behalf of more than one participant?

4. Did the district court abuse its discretion in denying petitioners' request for attorney's fees incurred while defending a long and unproductive suit, which the court itself characterized as being pursued with "excessive zeal, reflected in unparalleled vexatiousness"?

PARTIES BELOW

The names of all parties to this proceeding in the Seventh Circuit Court of Appeals appear in the caption of the case.

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OPINIONS BELOW

The unpublished order of the Court of Appeals for the Seventh Circuit, No. 94-1488, dated December 1, 1994, has been reproduced in the Appendix to this Petition. (Pet. App.[1], 1a-5a). The order followed an appeal from a judgment and order entered by the United States District Court for the Eastern District of Wisconsin, the Honorable J.P. Stadtmueller presiding, dated February 4, 1994. (Pet. App., 6a-35a).

The matter had been remanded to the district court from the Court of Appeals for the Seventh Circuit, 956 F.2d 651 (7th Cir. 1992) (Pet. App., 37a-68a), where it had been on appeal from the original order dated August 22, 1990. (Pet. App., 69a-91a) That appellate decision was the subject of an earlier denial of a petition for certiorari, __ U.S. __. (Pet. App., 36a).

STATEMENT OF JURISDICTION

Respondents brought this action in the Eastern District of Wisconsin, invoking federal question jurisdiction under 28 U.S.C. § 1331 and 29 U.S.C. § 1132. Following a complicated procedural history, the final order of the Court of Appeals for the Seventh Circuit was entered on December 1, 1994. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action involves section 502 of ERISA, 29 U.S.C. § 1132, which provides in pertinent parts:

> **(a) Persons empowered to bring a civil action.** A civil action may be brought—

1. "Pet. App." refers to the appendix bound with this petition.

(1) by a participant or beneficiary—

* * *

(B) to recover benefits due to him under the terms of his plan, to enforce his right under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

* * *

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or terms of the plan.

* * *

(c) **Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form.** (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 606 or section 101(e)(1) [29 U.S.C. § 1166(1) or (4) or § 1021(e)(1)] with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this title to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the

> control of the administrator) by mailing the material requested to the last known address of the requesting- participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participants or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.
>
> * * *
>
> **(g) Attorney's fees and costs; awards in actions involving delinquent contributions.** (1) In any action under this title . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

STATEMENT OF THE CASE

The largest issue remaining between the parties is whether petitioners must pay attorney's fees for respondents' unproductive, unverifiable, and excessive litigation activities during the seven years since respondents received the entire proceeds of their pension and profit sharing accounts. Unless this Court's instructions in *Hensley v. Eckerhart,* 461 U.S. 424 (1983), the Seventh Circuit's own holding in *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646 (7th Cir. 1985), and the decisions of other circuits are to be ignored, the decision below cannot be allowed to stand. Moreover, the five-fold inflation of statutory penalties engendered by Respondent Kuehl's solicitation of disgruntled employees and the district court's treatment of one request for a document as the legal equivalent of five independent requests can only serve to contort and magnify the obligations of benefit plan administrators at the

ultimate expense of participants and beneficiaries.

This action arose under an ERISA plan instituted by Alan D. Eisenberg, S.C. Petitioner Alan D. Eisenberg was the president and sole director of the service corporation which established the respondent pension and profit sharing plan (the Plan) and acted as its trustee and administrator. Thomas Kuehl, a respondent herein, was a corporate shareholder and performed various administrative tasks for the Plan. Respondents were employees of the firm, and participants in the Plan, who at various times during 1986 terminated their employment there, none as a result of retirement.

Respondents commenced this action in the United States District Court for the Eastern District of Wisconsin on November 24, 1987 under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001, *et seq.*, seeking immediate payment of benefits and compensatory damages for a delay in distribution of those benefits. Respondents also sought punitive damages, attorney's fees, and statutory penalties. Federal jurisdiction was conferred pursuant to section 502(e) of ERISA, 29 U.S.C. § 1132(e).

Within less than a month of being served, petitioners assured respondents their vested benefits would be paid in full. The Plan offered to make substantial partial benefit payments on December 24, 1987, but respondents declined to accept any distribution until the next calendar year. (Pet. App., 41a). The bulk of the distributions were made within the next 45 days, and by April 1988, each respondent had received everything attributable to his or her account, including interest and prorated forfeitures from ineligible participants (which caused small supplemental payments). (Pet. App., 74a-75a, 41a). Any litigation after that date could only be directed at the extra-contractual damage claims which were ultimately held to be unsupported by the statute or the statutory penalties theory which

Kuehl manufactured and inflated when he left the firm. (Pet. App., 86a).

After soliciting permission to do so from his new law partner, his wife, and two other ex-employees who worked for him, Kuehl began making written requests on behalf of all respondents for plan documents and distribution of benefits. (Pet. App., 21a-23a). The respondents' claims for statutory penalties are based on nine letters from Kuehl and one from Bihler. (Pet. App., 21a-23a). Each of Kuehl's letters purported to be on behalf of several people, and each demanded multiple copies of the same information, documents, or decisions.[2] The statute requires the transmittal of plan documents within thirty days, but demands for such items as "locations and amounts of assets" and "a complete accounting of the trust corpus and statements as to where funds were invested, and the terms of those investments" are not among the types of information enumerated in the statutory mandate, 29 U.S.C. §§ 1022-1025.

If each demand on behalf of multiple claimants is treated as a single request by their spokesman (who, presumably, needed only one copy of the Plan or the financial statement to do whatever he was doing on their behalf), a total of 1127 "document days" are at issue, of which 140 are in regard to material which the statute does not require the plan's administrator to produce. (Pet. App., 21a-23a). Only by multiplying each request by the

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2. Although some of this was for decisions on claims for benefit payments, all centered on the same issue: whether the Plan in effect when these people left the firm allowed distribution of benefits before actual retirement at normal retirement age. Several of Kuehl's letters also discussed independent disputes over his own personal claims for vacation pay, fees from clients of the original firm, and other matters unrelated to the Plan. When Eisenberg asked the plan's independent outside counsel what was due respondents when they filed the instant action, he was told the trust documents were unclear, but that such distribution would be permissible to avoid litigation. (Tr., v. 5, p. 749; v.3, pp. 344-348).

total number of people Kuehl claimed to be representing in the particular correspondence, and adding in the material not required by statute, could the penalty exposure go from 987 to 5044 days. Respondents then sought half a million dollars at a rate of $100 per day per person for each tardy response, but the district court reduced this to one dollar for each "document day," per person. This amount is not only inflated by more than 500%, but provides Bassler-Harsch with 955 times what the trial court deemed to be her actual damages. (Pet. App., 23a, 69a).

There was no mention of attorney's fees (other than preservation of the claim in the pleadings) until after the trial and decision in 1990. Thus, whatever fees respondents may claim for activity in the 31 months between December 1987 and August 1990 must have been for efforts the courts have since held had no basis in law, or for the statutory penalties which are arguably worth something between $987 and $5,044.

The work of respondents' attorneys on the appeal of this case was of equally questionable value. Before the court of appeals in 1990, they sought and were denied punitive and compensatory damages. (Pet. App., 43a-59a). In a subsequent petition for a writ of certiorari, they sought and were denied extra-contractual damages. (Pet. App., 36a). Other issues on that appeal were the respondents' right to a jury trial, which they lost, (Pet. App., 60a-61a), and their claims for statutory penalties and the calculation of their attorney's fees, which were remanded. (Pet. App., 64a-66a).

Even more inadequate were the time and task records presented to justify the fee petition. The district court could find no way to relate the time worked to the tasks at issue, and thus no way to allocate attorney's fees based on the propriety of the work performed. (Pet. App., 79a). If the fees were to be justified by whether the billed activity accomplished a positive result, after December 1987, respondents' counsel produced no more than

$5,044 for their clients, and for this they have sought $160,000 and been awarded $39,771.10. (Pet. App., 6a, 10a).

The trial court's method of calculating these fees departed in several ways from the lodestar technique ordered by the court of appeals, as well as any other rational allocation of work product. First, it did nothing about the costs of the appeals which petitioners won. (Pet. App., 15a). Moreover, respondents' hours were reduced by flat percentages, usually unrelated to work subject matter or time spent. Thus, some deductions were based on "overkill" and "vexatiousness," (Pet. App., 32a-33a), others on the mistaken allowance of a jury trial, (Pet. App., 30a-31a), and still others on the number of outstanding issues remaining after a particular ruling. (Pet. App., 29a-31a).

By April 1988, each respondent had received full payment, mooting their claims for benefit entitlements. Over petitioners' objection, respondents continued their claims for compensatory damages,and eventually accepted the court's remittitur, totalling $33,620. The district court also awarded them attorney's fees of $47,729.81, but denied their request for statutory penalties.

Whatever work was performed before the December 1987 promise of payout and April 1988 final distribution must have included some efforts in the ultimately unsuccessful areas of punitive damages, compensatory damages, and jury trial preparation. However, it is unlikely the $41,075 attributed to the pre-April 1988 period involved much attention to costs and attorney's fees, for nothing was ever said (beyond including that prayer in the pleadings) until after trial. Unfortunately, respondents' counsel's records contain nothing which would allow an analysis more detailed than these educated guesses.

The court of appeals affirmed the denial of punitive damages, reversed and denied the grant of extra-contractual damages, and remanded the case for reconsideration of attorney's

fees and denial of statutory penalties claim because the extra-contractual damages it had (improperly) allowed were deemed sufficient to resolve the matter. 956 F.2d 651 (7th Cir. 1992).

On February 4, 1994, the district court issued its final decision and order on the issues which had been remanded. Although respondents were seeking a daily penalty of $100.00 for each delinquent response to information requested, the court granted only $1.00 per day, per person. The court does not address whether efforts of an individual participant should be treated the same way as multiple requests by individual participants. The decision also omitted any discussion of whether information demands subsumed in correspondence about such other matters as loans for water pumps and former clients had the same effect as a straightforward request. Attorney's fees and disbursements were granted in the amount of $40,998.25. Even by its own terms, the district court's second attempt at an award of attorney's fees is neither rational nor fair. Depending on whether attorney's fees are treated as the same kind of claim as damages or statutory penalties for tardy data, the amount can change 25 percent ($39,771 to $29,556.60) because there is no way to relate hours to tasks or subject matter. And if the same reduction applied to trial time (because there should not have been a jury) is applied to pretrial preparation and post-trial motions, that reduction more than doubles, taking the "legitimate" fee down to $17,142.50.

On appeal for the second time, the Court of Appeals for the Seventh Circuit affirmed the lower court's decision in a two-page order it ordered not to be published. In so doing, that court offered no meaningful discussion of the applicable legal principles; rather, the panel disregarded this court's rulings, its own circuit's precedent, and the decisions of other circuits simply to rid itself of a troublesome case which can only inhibit fund administrators throughout the country.

REASONS FOR GRANTING THE WRIT

Important issues regarding the power and discretion of district courts in awarding penalties and attorney's fees under ERISA are implicated by this matter. Faced with binding authority on several issues raised on appeal, the Seventh Circuit issued a cursory unpublished order at war with precedent and policy. The court ignored *Hensley,* and its own holding that a district court may not "short cut" the lodestar system, award fees far in excess of the recovery, and then reduce those fees by using a ratio of successful claims to total claims, thus failing to consider the amount of time expended in pursuit of each "claim" or "issue." *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.,* 776 F.2d 646 (7th Cir. 1985). In affirming the award of attorney's fees, the court of appeals noted that the method utilized did not directly comply with its own recommendations, but nonetheless, these determinations, holding that respondents' entitlement to attorney's fees should be reduced by a percentage equal to the percentage of claims in which they succeeded, ignored binding authority of such simplistic mathematical calculations can not be utilized.

Further, the amount of the substantive claim in which respondents succeeded could only be categorized as *de minimis.* In such situations, the only reasonable fee may be no fee at all. *See Farrar v. Hobby,* 506 U.S. __, 113 S. Ct. 566, 121 L. Ed. 2d 494 (1992).

Error was also committed when the district court awarded statutory penalties pursuant to section 502 of ERISA. The trial court quintupled the penalty imposed because Kuehl said he was requesting information on behalf of all respondents in a single document, again without discussion. To allow penalties to be "stacked" in this manner can only encourage participants to incorporate additional names on an information request merely in an attempt to multiply potential statutory penalties. The result can

only be expensive defensive costs for administrators, paid for with fund resources better allocated to benefits for all participants.

This appeal is about how a plan participant may pursue his or her benefits, the appropriate responses of a plan administrator, and the correct administration of the statutes which control such transactions and the litigation which may arise from them. Petitioners ask this Court to delineate the proper method of determining attorney's fees and penalties for tardy responses to information requests. This petition asks whether rationality is a prerequisite for the assessment of attorney's fees and whether statutory penalties can be inflated by the recruitment of multiple plan participants to ask for the same data in the same communication. Every plan participant, administrator, and fiduciary will be affected by these answers.

ARGUMENT

The district court has ordered attorney's fees and costs to respondents based merely on a general acceptance of clearly inadequate time and work records and a series of reductions which have no reasonable relation to the work performed, the results produced, or the propriety of the activity. The lower courts have also ordered payment of discretionary penalties which had been inflated by redundancy and which had no relation to any loss or prejudice sustained by respondents. Petitioners' request for attorney's fees has been denied because, although they had provided resolution of the case in 1987, only to incur thereafter the cost of defending numerous claims which the courts have been found to have no legal basis, they were deemed not to be the prevailing party in this action.

Seven years of litigation and over $160,000 in attorney's fees have been accumulated by respondents to collect a substantive claim totaling between $987 and $5,044.

Respondents have failed to achieve anything beyond this *de minimis* penalty, but nevertheless claim an entitlement to attorney's fees for time expended on claims which the lower courts have termed "vexatious" and a classic example of "overkill". (Pet. App., 33a, 81a).

Clearly, a party should not achieve a windfall from participating in abusive tactics. A moving party is not permitted simply to file legal documents and claims, insisting that opposing counsel undertake burdensome factual and legal investigation, without first undertaking its own reasonable investigation. *See Burda v. M. Ecker Co.*, 2 F.3d 769, 775 (7th Cir. 1993). As the Seventh Circuit itself has noted, "the party advancing a legal theory has the burden of conducting a reasonable investigation of its viability before forcing an opponent to defend." *Land v. Chicago Truck Drivers Union,* 25 F.2d 509, 517 (7th Cir. 1994). (Rule 11 sanctions appropriate where reasonable investigation by plaintiff attorney would have revealed no legal basis for asserting a claim. *Id.* at 518.) Here, too, a reasonable investigation by respondents' attorney would have revealed that no legal basis existed for several of the claims which they forced petitioners to defend.[3] As noted in *Land,* sanctions should be imposed against the plaintiff rather than attorney's fees against the defendant where a claim is advanced which is not warranted by a good faith argument for the extension, modification, or reversal of existing law, regardless whether a second claim has some good faith justification. *Id.* at 516-17.

Because respondents' attorneys have imposed a considerable burden on both the courts,and the petitioners who had to defend against these claims, petitioner's claims asks this Court to determine the proper conditions under which attorney's

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3. The fact is that respondents filed five motions within the first six months of the litigation, all of which were denied by the court. (Pet. App., 10-11a).

fees may be imposed in ERISA actions. There should be no reward for initiating a vexatious, burdensome, and largely specious attack upon a benefit fund and its administration.

I.

THE VEXATIOUS AND UNPRODUCTIVE PROLONGATION OF LITIGATION SHOULD NOT BE REWARDED WITH ATTORNEY'S FEES WHICH ARE NOT SUPPORTED BY ADEQUATE TIME KEEPING.

Whatever may have led respondents to initiate this suit, the most they were ever entitled to receive was correct payment of their benefits, whatever penalty might properly be awarded for tardy responses to information requests, and attorney's fees for work which produced those results. This is exactly the type of calculation mandated by *Hensley*, but rendered impossible by the hopelessly inadequate recordkeeping of respondent's attorneys. The lower court's method of calculating attorney's fees failed to comply with the remanding court's recommendations to use the lodestar method; upholding that award has neither justification nor explanation.

In applying section 502(g)(1) of ERISA, the Seventh Circuit has held that an award of attorney's fees will be reversed upon a showing that the district court abused its discretion. *Dutchak v. Central States Pension Fund*, 932 F.2d 591 (7th Cir. 1991). That standard presupposes a reasoned exercise of discretion; a lack of explanation is often sufficient in itself to constitute an abuse of discretion where the reasons for a decision are neither explicated nor apparent from the record. *Production and Maintenance Employees' Local 504 v. Roadmaster Corp.*, 954 F.2d 1397 (7th Cir. 1992). As this Court established more than a decade ago, "[i]t remains important . . . for the district court to provide a concise but clear explanation of its reasons for a fee award." *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983).

A. Using A Proration Unrelated to Work Performed or Results Accomplished Is an Unwarranted Abdication of the District Court's Responsibility to Award Fees Pursuant to the Lodestar Method.

Rather than base its analysis on productive hours, time actually spent on successful claims, or consideration of ultimate results, the trial court reduced gross fees based on the percentage of "claims" upon which the respondents allegedly prevailed. This departure from the lodestar method solely because the attorneys seeking compensation did not keep adequate records of their own work was entirely arbitrary and constituted an abuse of discretion.

In determining attorney's fees, ". . . the judge must do more than eyeball the request and if it seems excessive cut it down by an arbitrary percentage. He has to make a judgment — considering the nature of the case and the details of the request, taking evidence if need be, and defending his judgment in a reasoned opinion." *Heiar v. Crawford County Wisconsin,* 746 F.2d 1190, 1204 (7th Cir. 1984), *cert. denied,* 472 U.S. 1027 (1985). In cases involving civil rights litigation (an analogy adopted by the Seventh Circuit in *Dutchak*), "the amount of attorney's fees they receive should be based on the work performed on the issues in which they were successful." *Nadeau v. Helgemoe,* 581 F.2d 275, 279 (lst Cir. 1978). "[A]ttorney's fees should be awarded . . . only for preparation and presentation of the claims on which a plaintiff is determined to have prevailed." *Busche v. Burkee,* 649 F.2d 509 (7th Cir. 1981), *cert. denied,* 454 U.S. 897 (1981); *see also, Muscare v. Quinn,* 614 F.2d 577, 578-79 (7th Cir. 1980). Thus, a party who prevails in only part of its action should not be compensated for all the legal expenses its suit would have generated if the action had involved only the prevailing claims. *Id.* Under this test, the majority of respondents' claims should have been deemed unsuccessful, and, accordingly, work performed on the unsuccessful aspects of the

litigation must be identified and denied.

Respondents (and the district court) focused on the distribution of benefit payments shortly after suit was filed as the proof that they were the prevailing party. This action was filed in November 1987, and the distribution was assured in writing within a month of service. By January 15, 1988, Respondents had received substantial cash payments and the full distribution was completed by April. (Orig. App. Exs.[4] 19, 20, 16, 22; Tr. V. 5, p. 804).

Respondents had only one arguably successful substantive claim thereafter: the issue of statutory penalties for tardy data responses. Because the claims for compensatory and punitive damages were not successful, "these unrelated claims [must] be treated as if they had been raised in separate lawsuits, and therefore no fee may be awarded for services [expended] on the unsuccessful claim." *Hensley,* 461 U.S. at 435. In a case where a party achieves only partial or limited success, the full lodestar based on all hours expended may be excessive. *Id.* at 436. Where the plaintiff has failed to prevail on a claim which is distinct in all respects from his or her successful claims, the hours spent on the unsuccessful claim should be excluded in calculating the reasonable attorney's fee. *Id.* at 440.

Respondents here made four different "substantive claims": They wanted (1) their benefit entitlements, (2) compensatory damages, (3) punitive damages, and (4) over half a million dollars in penalties for tardy responses to various data requests (of which they were awarded only 1%). Their first prayer for relief was stated in full by April, 1988; their second and third claims were deemed legally unsupportable. Thus, any work for which respondents now claim fees and which was performed after December 1987 was not in the successful pursuit of a benefits

4. Orig. App." refers to the appendix submitted with the brief filed in the 1991 appeal. "Exs." refers to exhibits in that appendix.

distribution because that had been resolved. If the work (at any time) was in pursuit of punitive or compensatory damages, it was legally incorrect, perhaps improper, and certainly unsuccessful. If that work was to obtain statutory penalties, it achieved only 1% of its goal, and may not even be that successful if petitioners prevail in this appeal.

Because there must be a separation of successful and unsuccessful claims and a limit of attorney's fees to only those which are successful, the lodestar method is the preferred determinant of a fee award, a view voiced by the court of appeals in its earlier review (Pet. App., 66a), and consistent with well established precedent:

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation . . . The party seeking an award of fees should submit evidence supporting the hours worked. . . . Where the documentation of hours is inadequate, the district court may reduce the award accordingly. The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." . . . (citations omitted). Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission.

Dutchak, 932 F.2d at 596-597, quoting *Hensley*, 461 U.S. at 433-434. (Emphasis added).

Respondents did not and cannot produce records which allow any analysis of how their attorneys spent their time, which

hours can be assigned to which tasks, or which hours produced effective results instead of wasted attempts at unfounded claims. (Pet. App., 27a-28a). Because these time records were so abysmal, the district court invoked a different method to allow any fee payment. But this alternative analysis must still have some rationality, or it will simply penalize petitioners who are entitled to an opponent's fee limited to the actual work which produced a successful result.

The matter cannot be resolved by a system of percentages which have no relation to actual work and claims. The lower court tried to use a ratio which treated every claim (regardless whether substantive like the benefits distribution, derivative like punitive damages, or ancillary like fees) as having the same initial value and then reducing the total by various equal shares at different stages of the case. The result was that an invalid claim such as the punitive damages count started at 20% of the total (regardless of how much work was actually done on it), grew to 25%, and then became zero. If only four substantive claims had been used (treating attorney's fees as a different category), the district court's own analysis would yield an ultimate result of as little as 43% of its award. This system was neither reasonably related to actual performance nor a rational alternative to a lodestar system which apportions reward to product.

Where the "lodestar" amount could not be determined, the practice of using some ratio of successful issues to total issues has been specifically disallowed. *Ohio-Sealy Mattress Mfg. Co. v. Sealy Inc.*, 776 F.2d 646 (7th Cir. 1985), involved a prevailing party's attorney who had failed to keep adequate records, so no lodestar could be determined. When the trial judge there granted a fee of 75% of total hours because the client prevailed on 75% of the issues, the appellate court relied on *Hensley* to reject a "mathematical approach comparing the total number of issues in the case with those actually prevailed upon." *Id.* at 652, quoting *Hensley*, 461 U.S. at 435-436. The court noted, "[v]ariations of

the *Hensley* approach may suffice, but using a ratio of successful issues to total issues does not." *Id.* at 653.

Similarly, tying the number of hours accepted as reasonable solely to the proportion of defendants ultimately prevailed against was specifically rejected by the Ninth Circuit in *Cunninham v. County of Los Angeles,* 879 F.2d 481 (9th Cir. 1988), *cert. denied,* 493 U.S. 1035 (1990). Such a unifactor approach is inconsistent with the "statutory mandate that district courts exercise discretion by considering all factors relevant to reasonableness." *Id.* at 486 (emphasis added).

A fee applicant must meet the burden of showing which portions of his work were sufficiently related to the successful claims to be compensable, and must submit evidence in support of those hours worked. *Hensley,* 461 U.S. at 433. The fee applicant bears the burden of documenting "the appropriate hours expended and hourly rates." *Tomazzoli v. Sheedy,* 804 F.2d 93, 96 (7th Cir. 1986), quoting *Zabkowicz v. West Bend Co.*, 789 F.2d 540, 548 & n.8 (7th Cir. 1986). If the applicant cannot demonstrate the number of hours expended on a specific claim, he has not met that burden. Adequate documentation is necessary for the court to satisfy its review requirement and, as the Seventh Circuit itself has established, a court must disallow hours devoted to unrelated matters, and "hours for which the plaintiff provides inadequate documentation." *Ohio-Sealy Mattress Mfg. Co.,* 776 F.2d at 651. It is undisputed that the respondents could not satisfy this documentation requirement.

To overcome the lack of data, the district court assumed that the benefits, punitive damages, compensatory damages, statutory penalty, and attorney's fee claims all had equal value. (Pet. App., 30a). This approach fails to consider whether the unsuccessful claims required more or less time than the successful claim. This is totally unrealistic for, other than canceled loans, the benefit distributions totaled only $54,145.56, the punitive and

compensatory damages were worth nothing as a matter of law, and the statutory penalties only between $955 and $5,044. But because respondents' counsel could not provide any detailed records, each of these was treated as worth 20% of the work and fees in the first phase of the case. As a result, petitioners were assessed a gross amount of $8,215 for each claim being pursued at that point, or $24,645. Thus the $41,075 expended before final distribution, which undoubtedly focused more on benefit payout than, for example, attorney's fees, was reduced by as much for the ultimately unsuccessful punitive damages claim and the statutory penalty, as for the attorney's fees which could not have involved any significant work in that period. Stranger still, because the benefits issue was resolved without court action, each remaining claim became worth 25% of fees after April 1988. Until the punitive damages count was dismissed in January 1990, it received as much value as the substantive issues which went to trial and the fees which were never discussed. No guidance other than default by poor record-keeping is given as to why a claim worth 20% of the fees but probably not worked on before April was now worth 25% of the fees, even though still not a probable subject of much activity.

Then, because petitioners paid out the principal claim and won dismissal of an improper theory, they had to start paying 33% (instead of 20%) of total billings for the same fee petition which was not filed until after completion of the trial. And although the district court now acknowledges that it imposed on petitioners twelve times the litigation time necessary by incorrectly allowing a jury trial, it never reduced respondents' trial preparation, pretrial discovery, and motion practice by the same factor. If the three issues which survived after dismissal of the punitive damages claim were worth only one-twelfth the time claimed for the trial itself, why were they each worth one-third of the preparation time for that trial? Even taking the district court's methodology in its best light, using its own analysis consistently, and merely treating attorney's fees as something different from

an independent claim, the award should be reduced by 57%. That magnitude of difference demonstrates the irrationality of the district court's decision.

In its remand order, the court of appeals made clear its preference for the lodestar method. (Pet. App., 66a). Respondents' counsel kept such poor records that the district court could not satisfy that instruction if it wished to allow any attorney's fees. Rather than dismiss the fee petition because it could not be supported by fact, the district court allowed respondents to salvage nine-tenths of the original amount attributed to fees, costs, and statutory penalties by using a proration system for which, in the end, penalized petitioners every time they won a point.

This methodology, directly rejected in *Ohio-Sealy Mattress Mfg. Co.*, 776 F.2d at 653; was flawed because it failed to consider whether the successful claims required more or less time than the unsuccessful claims, and "although disallowing twenty-five percent of the hours claimed on the equitable issues may have seemed the fair thing to do, *Hensley* does not permit that approach." Id. Nothing in its new decision explains why the appellate court should now disregard its own precedent and the instructions of this Court by summarily affirming the irrational analysis of the district court' s second opinion.

This Court must find that the courts below acted arbitrarily and abused their discretion in awarding respondents attorney's fees based on a percentage of successful claims. "[U]ncertainties should be resolved against the plaintiff, if arising because of imprecise recordkeeping without adequate justification." *H.J. Inc. v. Flygt Corp.*, 925 F.2d 257, 261 (8th Cir. 1991), citing *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1275 (8th Cir. 1980), *cert. denied*, 449 U.S. 1063 (1980). If the applicant cannot produce adequate documentation of his hours spent in pursuit of successful claims, there is no way

to tell whether the challenged percentages were more or less than the compensable hours; without that proof, the applicant has not satisfied his obligation to limit his fee request to the successful portion of his work product.

B. Attorney's Fees Should Not Have Been Considered a "Substantive Claim" for Which Respondents Were Entitled to Receive Additional Attorney's Fees.

In awarding attorney's fees, the district court divided the respondents' suit into five separate claims: (1) benefit disbursements; (2) compensatory damages; (3) punitive damages; (4) statutory penalties under ERISA; and (5) claims for attorney's fees and costs. Determining attorney's fees based upon a percentage of the "claims" upon which the respondents were deemed successful required the court to posit that counsel devoted an equal amount of time to each of these claims, that respondents' counsel prevailed on three of these claims (disbursements, statutory penalties and attorney's fees), and, therefore, that he was entitled to a proportionate share of the time spent on the total litigation. (Pet. App., 30a). This analysis is flawed not only by the use of a mathematical ratio of successful and unsuccessful claims,but also because litigation in pursuit of attorney's fees is not a "substantive claim" upon which attorney's fees could be collected.

Even if a mathematical approach to calculating attorney's fees does not constitute a *per se* abuse of discretion, the lower courts' calculations were nevertheless improper because they included attorney's fees as a successful "substantive" claim upon which respondents were entitled to increase their entitlement to attorney's fees. This is clear error. Attorney's fees are not a substantive claim — they are only a consequence of other claims, not an independent cause of action which should be treated as a separate claim warranting compensation for 20% to 33% of all hours worked, regardless of the actual subject matter of that

specific activity. Such a theory would encourage parties to sue for attorney's fees regardless of any substantive claim. *See Dickie v. City of Tomah*, 999 F.2d 252, 254-55 (7th Cir. 1993).

By removing attorney's fees from the claims upon which respondents prevailed, the number of substantive claims is reduced to four of which respondents were successful in only two. By undertaking the same calculation as the district court with four claims rather than five, their entitlement is reduced significantly — the maximum award should have been $59,713.00, which would then be reduced by 50% for excess and vexatiousness, resulting in attorney's fees totaling $29,856.50, rather than $39,771.10.

II.

BECAUSE THEY DID NOT PREVAIL IN ANY MEANINGFUL WAY, RESPONDENTS SHOULD NOT HAVE BEEN ENTITLED TO ATTORNEY'S FEES IN THE FIRST INSTANCE.

By itself, the total inability to substantiate their claim with appropriate records should deny respondents' the fee petition. Rather than dismiss this claim out of hand because it could not be proven, the lower court accepted it in gross and then whittled it down from $152,650 to $39,771.10 by reduction factors for unsuccessful claims and then for excessive and duplicative fees and lack of professional conduct.

This approach constituted clear error not only for the methods utilized in determining the amount, but also because respondents should not have been deemed entitled to fees at all for the statutory amount awarded to respondents was insufficient to justify the award of fees, and secondly, respondents should not be considered the prevailing party entitled to fees.

A. Having Accomplished Only a *De Minimis* Statutory Award After April 1988, Respondents' Counsel Should Not Be Awarded Fees for Work Performed After That Date.

Suit was filed November 2, and served November 25, 1987. By December 24, 1987, respondents had been assured that they would receive all money attributed to their accounts. From that point on, litigation was either (1) unnecessary because the payment had been achieved, (2) unsuccessful because all other theories of recovery were held to be legally unfounded, or (3) *de minimis* because it produced a result of no more than $5,000. Not including subsequent unsuccessful appeals, respondents spent over $85,000 to win a technical penalty which may not be worth $1,000.

Where a party achieves only a "technical" or "*de minimis*" victory and recovers only nominal damages, the only reasonable fee is usually no fee at all. *Farrar v. Hobby,* 506 U.S. __, 113 S. Ct. 565, 575, 121 L. Ed. 2d 494 (1992). In *Farrar,* the plaintiffs brought a § 1983 action for compensatory damages alleging that officials had illegally closed the plaintiffs' school. The Supreme Court held that before undertaking the lodestar analysis, a district court faced with a petition for attorney's fees should consider the extent of success in the litigation. Justice O'Connor wrote in concurrence:

> when a plaintiff's victory is purely technical or *de minimis,* a district court need not go through the usual complexities involved in calculating attorney's fees . . . Instead, it is enough for a court to explain why the victory is *de minimis* and announce a sensible decision to 'award low fees or no fees at all'.

Id. at 576 (O'Connor, J. concurring).

To determine whether a plaintiff's victory is *de minimis,* a court should look at "the difference between the judgment recovered and the recovery sought, the significance of the legal issue on which the plaintiff prevailed and, finally, the public purpose served by the litigation". *Cartwright v. Stamper,* 7 F.3d 106, 109 (7th Cir. 1993). Respondent sought substantial damages, but since the benefit distribution, the courts have determined they are entitled to only a *de minimis* or technical statutory penalty which is valued somewhere between $987 and $5,044. The significance of the legal issue on which the respondents have prevailed and the extent of their success since April 1988 has been deemed a nominal statutory penalty of $1 per document day.

The third factor, the public purpose served, addresses whether the victory vindicates important rights and deters future violations. *Farrar,* 113 S. Ct. at 578-79. The more important the rights at stake and the more egregious the violation, the more likely it is that the victory serves a public purpose. *Id.* In the instant litigation, no punitive damages were (or could be) awarded, the rights were statutorily limited, and the violation was only a technical failure to supply responses which Eisenberg did not understand respondents were legally entitled to receive.

Respondents succeeded only in a technical manner, and should not be entitled to attorney's fees. As in *Farrar,* the litigation accomplished little beyond giving respondents the "moral satisfaction of knowing that a federal court concluded that their rights had been violated in some unspecified way." *Id.* at 574; *see also, Northbrook Excess & Surplus Ins. Co. v. Procter & Gamble. Co.,* 924 F.2d 633 (7th Cir. 1991) ($45,000 recovery in light of claims exceeding $5 million found to be *de minimis*); *Lewis v. Kendrick,* 944 F.2d 949 (lst Cir. 1991) (jury award was technical and *de minimis* where plaintiff seeking $300,000 received verdict of $1,000).

B. Petitioners Could Not Properly Be Classified as a Prevailing Party Entitled to Attorney's Fees.

Since December 1987, respondents spent seven years and over $160,000 to win between $955 and $5,044. Like the other tactics they used, respondents' counsel took fee overkill to new extremes. Few cases offer a better example of the evils described in *Leigh v. Engle,* 858 F.2d 361, 370-71 (7th Cir. 1988), *cert. denied,* 489 U.S. 1078 (1989):

> Perhaps only Charles Dickens could savor this litigation. For nearly a decade now, the parties have fought bitterly over the Reliable trust, the only noticeable effect being the diminution of its assets. The advocacy has been harsh and often vituperative: the lawyers have accused each other of personal wrongdoing, discovery disputes continued through the last day of trial, and shouting matches have broken out. If it were possible to bottle the contempt, even hatred, which the lawyers and parties feel for one another, there would be enough to sustain a small civil war for months. The great length and extraordinary difficulty of this litigation owes much to the depth of the combatants' animosity.
>
> This is a case that existed, through much of its ten year life, almost solely for the benefit of the lawyers. That is indeed unfortunate, for the costs are borne most heavily by the those whom ERISA was intended to protect — beneficiaries and their families. We wish the trustees had considered the consequences of their actions before breaching their duty of

> loyalty to the beneficiaries. We also wish, however, that respondents' counsel had paused for a moment to realistically assess, at each stage of the game, the impact of the extensive litigation on their clients. Had they done so, everyone involved would have better off.

Courts considering awards of attorney's fees have traditionally listed five factors which must guide their discretion:

> (l) the degree of the opposing parties' culpability or bad faith; (2) the ability of the opposing parties to satisfy an award of fees[5]; (3) whether an award of fees against the opposing parties would deter others from acting under similar circumstances; (4) whether the parties requesting fees sought to benefit all participants and beneficiaries of an, ERISA plan or to resolve a significant legal question regarding ERISA; and (5) the relative merits of the parties' positions.

Operating Engineers Pension Trust v. B & E Backhoe. Inc., 911 F.2d 1347, 1357 (9th Cir. 1990) (citations omitted); *see also, Nachwalter v. Christie,* 805 F.2d 956, 961 (11th Cir. 1986); *Davidson v. Canteen Corp.*, 957 F.2d 1404, 1409 (7th Cir. 1992); *Marquardt v. North American Car Corp.*, 652 F.2d 715 (7th Cir. 1981).

After the March 1988 distributions, respondents' counsel accomplished virtually nothing for the members of the Plan[6], nor

5. As for this factor, petitioner corporation and fund no longer exist, and petitioner Eisenberg is in personal bankruptcy, *Petition of Alan D. Eisenberg,* Bankruptcy Case No. 91-01185 (E.D. Wis.).

6. While the five plaintiffs may have gained a few thousand dollars (Cont'd)

succeeded in any legal theory. Instead of compensation for work which resulted in payment to the common fund of all plan participants, counsel want to be paid for squandering time and resources, and forcing petitioners to resist claims which had no legal foundation. Petitioners were successful on virtually all counts, and resolved the principal claims before the first hearing was scheduled. Continued overzealous pursuit of unfounded and unsupportable claims is exactly the type of empty-headed abuse of a defendant which the Seventh Circuit itself has been quick to condemn. *Thornton v. Wahl,* 787 F.2d 1151, 1154 (7th Cir. 1986), *cert. denied,* 479 U.S. 851 (1986); cited with approval, *Chambers v. American Trans Air Inc.,* 17 F.3d 998, (7th Cir. 1994), *cert. denied,* 115 S. Ct. 512, 130 L. Ed. 2d 419 (1994); *see also, Land,* 25 F.2d 518.

Again, an award of attorney's fees under ERISA is confined to winners. *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820 (7th Cir. 1984); *Henderson v. UNUM Life Ins. Co.,* 736 F. Supp. 100 (D.C.S.C. 1989), *aff'd,* 900 F.2d 252 (4th Cir. 1990). Because nothing in the results of this case supports respondents' entitlement to fees, and because the positions taken by the petitioners have been "substantially justified", respondents' petition should have been denied.

III.

RESPONDENTS SHOULD NOT BE ALLOWED TO QUINTUPLE THEIR CLAIM FOR PENALTIES SIMPLY BY ADDING NAMES TO THEIR REQUEST.

It is undisputed that Kuehl invited his partner, his wife, and his employees, to join him in pressing Eisenberg. Insofar as

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(Cont'd)
beyond their lump sum distributions, the other participants received no benefit from this litigation, and the costs sustained by the plan in its defense may well have seriously disadvantaged those active participants who remained dependent upon it for their retirement security.

Kuehl sent the correspondence which formed the basis for respondents' claims for statutory penalties as the representative of all five people, each was a single request, not five separate notices nor expressions of five separate needs. To the extent that these requests sought copies of various plan documents common to all participants, the representative of all five did not need five separate copies of each item to read the rules, the financial statements, or the other information those documents contained.

Moreover, several of these requests were beyond the scope of statutory requirements. Neither the demands about the location of fund assets nor the terms of particular investments are among the documents and data listed in the statute, yet over 10% of the claim is based on requests for that information.

Quintupling the penalty which a single information request might engender is not supported by cases in which requests made seriatim were treated as independent bases for penalties. In *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991), a series of requests on behalf of a single person to receive various data was treated as several different bases for penalties. New requests may warrant new penalty periods to provide a marginal deterrent to violations, but "[a] single 'request' for 100 documents may allow only [the statutory maximum] of $100 per day . . ." *Id.* at 1211. Only one document was needed for Kuehl's ascertainment of benefit rights. As in *Ziaee*, a single request for information can result in only one statutory penalty being imposed.

While "stacking" penalties may sometimes be appropriate, neither respondents nor the courts below cited any authority which held that a single request for a particular document could generate $500 per day penalties if purportedly made on behalf of multiple participants. What public policy is served by discouraging anyone from taking the responsibility of an unpaid fiduciary (29 U.S.C. § 1106) if a disgruntled ex-employee can

explode a penalty five fold simply by asking others to allow the use of their names?

IV.

BECAUSE THE PETITIONERS PREVAILED ON VIRTUALLY ALL MATTERS REMAINING IN ISSUE AFTER DECEMBER 24, 1987, THEY SHOULD BE AWARDED ATTORNEY'S FEES AND COSTS INCURRED AFTER THAT DATE.

Section 502(g)(1) of ERISA, provides a court discretion to award attorney's fees to a prevailing defendant. In making this determination, courts generally consider the five factor analysis set forth above. *See Davidson,* 957 F.2d at 1409; *Marquardt,* 652 F.2d 715. However, *Bittner,* 728 F.2d at 828-29, noted that the five-factor test was specifically oriented toward a case where a plaintiff was the prevailing party, not the defendant. To deal with this bias warranted a more general and less cumbersome approach for attorney's fees under ERISA. *Id.; see Meridith v. Navistar Int'l Transp. Corp.,* 935 F.2d 124, 128 (7th Cir. 1991). Borrowing from the Equal Access to Justice Act,[7] the *Bittner* court ruled that the prevailing party is entitled to reasonable attorney's fees unless that the position of the losing party was "substantially justified," or special circumstances would make an award unjust; otherwise, the successful defendant should be awarded costs and fees as the prevailing party. *Hooper v. Demco Inc.,* 37 F.2d 287, 294 (7th Cir. 1994)."In order to warrant an award of attorney's fees, the prevailing party must demonstrate that the losing party's position was not substantially justified, or that the losing party's position was taken to harass or vex the prevailing party." *Id.,* citing *Meridith,* 935 F.2d at 128. This has created a conflict among the circuits. For example in *Gray v. New England Tel & Tel. Co.,* 792 F.2d 251, 257-260 (1st Cir. 1986), the First Circuit specifically rejected the *Bittner* approach.

7. 29 U.S.C. § 1412(d)(1)(A).

Nevertheless, petitioners here have prevailed on several major substantive claims, including a denial of both punitive and compensatory damages. Furthermore, much of respondents' litigation was intended solely to "harass" or "vex" their former employer. Seven years pursuing a substantive claim arguably valued at less than $1,000 offers a vivid example of vexatiousness.

Since December 24, 1987, respondents have known they would get everything they sought in the early distribution of their retirement benefits, and they had all that money in hand by March 1988. Even during that time period, when the only significant issue worth lawyer activity was an accounting to assure full payment, respondents pursued discovery and motion practice with such a vengeance that the district court found them to be like protagonists in a "children's sandbox spate," (Supp. App. SA-9[8]), taking their action to the extremes of a "ridiculously long life" (Pet. App., 33a) in order to punish their former employer and, apparently, increase their own attorney's fees. Petitioners should be reimbursed for being forced to fend off this panoply of "unparalleled vexatiousness" and "[e]xcessive zeal to the point of overkill." (Pet. App., 80a-81a).

After December 24, 1987, the litigation persisted only because of the "unparalleled vexatiousness" of claimants and their attorneys and their hope to obtain half a million dollars in penalties for tardy transmittal of information which would do nothing to aid their economic claims. In the same seven years, petitioners have had to incur over $160,000 in fees and costs to resist unfounded claims for extra-contractual and punitive damages and to appeal successfully the improper imposition of a jury trial. Even if no fee award were deserving before the December 1987 pledge to distribute benefits, petitioners prevailed on every significant issue since that time, and the costs

8. "Supp. App." refers to the Supplemental Appendix furnished with Defendants-Appellants' original brief to the Seventh Circuit, and "SA" refers to page numbers in that material.

of those victories should be repaid by the parties who forced them to be incurred.

The lower courts' alternative position is both inconsistent and unsupportable. In theory, respondents were entitled to exemption from a fee assessment because their suit was not "vexatious, frivolous, or brought to harass or embarrass the defendant", (Pet. App., 15a), but the same district court has repeatedly described respondents' litigation as an example of "excessive zeal, reflected in unparalleled vexatiousness," the very phrase used by the this Court to support the award in *Hensley*. Whatever value is attached to the distribution of benefits in 1987, that does not warrant forcing petitioners to pay for respondents' attempt to punish them by continuing the case through a "ridiculously long life,", of seven more years in search of legally impermissible damages and *de minimis* penalties.

CONCLUSION

For these reasons petitioners request that the December 1, 1994 order of the court of appeals be reversed and vacated to deny respondents' application for attorney's fees, that the assessment of statutory penalties be reduced, and that the petitioners be compensated for the legal fees and costs expended in their defense of this action.

Respectfully submitted,

ALAN M. LEVY
Counsel of Record
LINDNER & MARSACK, S.C.
Attorneys for Petitioners

Dated: February 27, 1995.

APPENDIX A — JUDGMENT WITH ORAL ARGUMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED DECEMBER 1, 1994

United States Court of Appeals
For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT - WITH ORAL ARGUMENT

Date: December 1, 1994

BEFORE: Honorable RICHARD D. CUDAHY, Circuit Judge
Honorable JOEL M. FLAUM, Circuit Judge
Honorable STANLEY J. ROSZKOWSKI,
District Judge*

No. 94-1488

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, et al.,

Plaintiffs - Appellees

v.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President of the ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN, and ALAN D. EISENBERG, S.C., a Wisconsin corporation,

Defendants - Appellants

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*The Honorable Stanley J. Roszkowski, of the United States District Court for the Northern District of Illinois, is sitting by designation.

Appendix A

Appeal from the United States District Court for the
Eastern District of Wisconsin
No. 87 C 1345, J. P. Stadtmueller, Judge

The judgment of the District Court is AFFIRMED, with costs, in accordance with the decision of this court entered on this date.

Appendix A

In the
United States Court of Appeals
for the Seventh Circuit

ARGUED October 4 1994
DECIDED December 1, 1994

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. STANLEY J. ROSZKOWSKI, District Judge*

No. 94-1488

No. 87 C 1345
J.P. Stadtmueller, *Judge*

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, et al.,

Plaintiffs-Appellees

v.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President of the ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN, and ALAN D. EISENBERG, S.C., a Wisconsin corporation,

Defendants-Appellants.

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* The Honorable Stanley J. Roszkowski, of the United States District Court for the Northern District of Illinois, is sitting by designation.

Appendix A

Appeal from the United States District Court for the Eastern District of Wisconsin.

ORDER

This is our second consideration of this case. When it was first before us we reversed the award of compensatory and punitive damages and remanded for further consideration of statutory penalties and attorney's fees. On remand, the district court granted both statutory penalties and attorney's fees to the plaintiffs. Eisenberg now appeals this ruling.

The district court awarded statutory penalties of $1 per document day, which reflected a significant reduction for poor behavior by both parties. The district court also determined that plaintiffs were the prevailing party in this case, and were thus entitled to attorney's fees. Finding the records too incomplete to follow the lodestar method recommended by this Court, the district court was forced to use a different method of determining which fees were related to valid ERISA claims and which to the compensatory and punitive damages claims ruled invalid by this Court.

To calculate the allowable fees, the district court took the total time for which fees and costs were submitted and divided it into five different time periods. The total amount requested for each time period was then divided by the number of claims being debated during that period, resulting in an estimate of the per claim cost. The costs for claims for which attorney's fees were not allowed (compensatory and punitive damages), were then subtracted from the total fees for that time period. This procedure was followed for every time period except for the six days of the trial. For that time, the district court decided that without the

issues of compensatory and punitive damages there would have been an evidentiary hearing rather than a trial, and the hearing would have taken about 1/12 of the time the trial took. Thus the court reduced the total fees for that period to 1/12 of the total. Finally, once it had calculated a total amount for all fees and disbursements, the court further reduced the total amount by 35% for excessive billing and 15% for the rancorous nature of the proceedings, which it concluded undoubtedly prolonged the litigation.

While this method of calculating attorney's fees does not directly comply with this Court's recommendation, we find it to be a thorough and fair attempt to reach some sort of reasonable estimate of appropriate fees. For these reasons and those stated by the district court, we find no abuse of discretion and the ruling of the district court is AFFIRMED.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN FILED FEBRUARY 4, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NUMBER: 87-C-1345

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR,

Plaintiffs,

v.

ALAN D. EISENBERG, et al.

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came on for consideration before the Court, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that defendants' motion for attorney fees be and the same is hereby DENIED; and,

IT IS FURTHER ORDERED that plaintiffs' motion for statutory penalties pursuant to 29 U.S.C. section 1132(c) be and the same is hereby GRANTED; defendant Eisenberg is

hereby directed to pay statutory penalties in the amount of $1,052 to Thomas Kuehl, $1,064 to Lisa Tallar, $1,018 to Douglas Bihler, and $995 each to Paula Miller and Kathaleen Bassler Harsch; and,

IT IS FURTHER ORDERED that plaintiffs' motion for attorney's fees pursuant to section 1132(g)(1) be and the same is hereby GRANTED in the amount of $40,998.25 ($39,771.10 in fees plus $1,227.15 in disbursements).

Approved: s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge

February 4, 1994
Date

SOFRON B. NEDILSKY
Clerk

s/ Michael Kraud
(By Deputy Clerk)

APPENDIX C — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN FILED FEBRUARY 4, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

87-C-1345 (JPS)

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER and LISA P. TALLAR,

Plaintiffs,

vs.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President of THE ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN, and ALAN D. EISENBERG, S.C., a Wisconsin corporation,

Defendants.

DECISION AND ORDER

APPEARANCES:

For Plaintiffs:

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INTRODUCTION

This action is presently before the court on defendants' motion for attorney's fees, and plaintiffs' motion for statutory penalties and attorney's fees. For the reasons set forth more fully below, the court will deny defendants' motion and grant plaintiffs' motion.

FACTS AND PROCEDURAL HISTORY

Plaintiffs, Kathaleen A. Bassler Harsch, Douglas M. Bihler, Thomas D. Kuehl, Paula C. Miller and Lisa P. Tallar, all former employees of Alan D. Eisenberg, S.C., commenced this action on November 24, 1987 alleging that defendant Alan D. Eisenberg, president and sole director of Alan D. Eisenberg, S.C., a Milwaukee law firm, and named trustee and administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan (hereinafter the "Plan"), failed to distribute employees' pension benefits. Specifically, plaintiffs alleged that Eisenberg failed to provide plaintiffs with copies of the Plan materials and statements; failed to comply with written requests for copies of Plan records; failed to respond to written claims for benefits made in May 1987; and failed to distribute benefits under the Plan, thereby breaching his fiduciary duty to plaintiffs. By their

complaint plaintiffs sought an order directing Eisenberg to turn over Plan materials, statements and records, and to distribute the benefits to which plaintiffs were entitled. Plaintiffs also sought interest statutory penalties, attorney's fees and costs, as well as compensatory and punitive damages from Eisenberg. Plaintiffs amended their complaint on May 5, 1988 to include an allegation that Eisenberg failed to respond to written claims for benefits made by plaintiffs during 1986 and 1987, in violation of the terms of the Plan and as mandated by 29 U.S.C. § 1133.

Although defendants continually denied all liability, in January 1988, they made an initial payment of benefits to plaintiffs, and distribution of benefits was completed by April of that year. Subsequently, defendants moved to dismiss plaintiffs' complaint arguing that neither compensatory nor punitive damages are available in an action brought by individual beneficiaries under ERISA. The court denied defendants' motion with respect to compensatory damages and allowed that issue to be tried to a jury; the court granted defendants' motion to dismiss the punitive damages claim. Following trial of this action, a jury awarded compensatory damages to plaintiffs as follows: $7,500 each to plaintiffs Bassler Harsch, Bihler, Miller and Tallar; and $25,000 to Kuehl. Defendants filed a motion for judgment notwithstanding the verdict, which the court denied. However, the court granted remittitur and judgment ultimately was entered awarding compensatory damages to plaintiffs as follows: $1.00 to Bassler Harsch, $4,800.00 to Bihler, $709.00 to Miller, $3,110.00 to Tallar, and $25,000 to Kuehl.

The parties filed several additional motions: defendants moved for sanctions under Federal Rule of Civil Procedure 11, based on the fact that plaintiffs filed five motions within the first six months of the litigation, all of which were denied by the court;

plaintiffs asked the court to impose statutory penalties on defendants as a sanction for defendants' refusal to comply with plaintiffs' repeated requests for Plan information; finally, plaintiffs sought attorney's fees in the amount of $146,000 under ERISA § 502(g)(1). The court denied defendants' request for sanctions and plaintiffs' request for statutory penalties, but granted plaintiffs' request for attorneys fees. In denying plaintiffs' motion for statutory penalties, the court held that "[a]ny damage or prejudice suffered by the plaintiffs as a result of the defendants' failure to freely provide information ... is directly reflected in the tardy payment of benefits," for which the plaintiffs would receive compensatory damages. Order of August 2, 1990 at 2. Furthermore, although the court granted plaintiffs' request for attorney's fees, it awarded only $47,729.81, disallowing the remainder of the request as "hours not reasonably expended." August 2, 1990 order at 8.

On appeal, the Seventh Circuit held that neither compensatory nor punitive damages were available to plaintiffs. *Harsch v. Eisenberg*, 956 F.2d 651, 660-61 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992). The court therefore reversed the judgment awarding plaintiffs compensatory damages, but affirmed the court's dismissal of plaintiffs' claim for punitive damages. *Id.* at 663-64. The Seventh Circuit affirmed the court's decision to deny sanctions. *Id.* at 664. However, having concluded that compensatory damages were not available, the Seventh Circuit vacated this court's decision to deny plaintiffs' motion for statutory penalties on the ground that such penalties would be included in an award of compensatory damages. The court remanded the statutory penalties and attorney's fees issues for further proceedings. *Id.* at 662-64. Thus, the action is now before the court on plaintiffs' motion for statutory penalties and attorney's fees, and defendants' petition for attorney's fees.

Appendix C

DISCUSSION

I. Defendants' Motion For Attorney's Fees

On March 30, 1993, defendants filed an amended petition for attorney's fees and costs. The petition is based on ERISA § 502(g)(1), 29 U.S.C. § 1132(g)(1), Federal Rules of Civil Procedure 54 and 11, and Local Rule 9.04 (E.D. Wis. Jan. 15, 1993). It is identical to defendants' earlier petition filed November 9, 1992, except that it seeks to recover fees and costs from plaintiffs' attorneys, in addition to seeking fees and costs from plaintiffs.

In their petition, defendants contend that they are entitled to attorney's fees and costs in the amount of $160,405.40 — the amount of defendants' actual costs of defense and appeal — because the Seventh Circuit held that plaintiffs' claims for compensatory, punitive and extra contractual damages were not permissible. In particular, defendants argue that plaintiffs should be required to reimburse them for fees and costs incurred after the full payment of benefits.

In opposition to defendants' petition plaintiffs argue that defendants are not entitled to recover attorney's fees and costs because defendants were not the "prevailing party" in this action. Alternatively plaintiffs argue that, even if the court determines that defendants did prevail, it should nonetheless deny defendants' petition for fees in the interest of justice; such an award would be unjust and contrary to the remedial purpose of ERISA.

ERISA § 502(g)(1) provides that "[i]n any action under this subchapter (other than an action described in paragraph (2)) by a

participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1) (1985). Although this section does not expressly limit awards to "prevailing parties", cases coming out of this district, and of other districts within the Seventh Circuit, repeatedly have applied § 502(g) in such a fashion. Indeed, in *Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 829 (7th Cir. 1984), Judge Reynolds noted that "[a]fter *Ruckelshaus v. Sierra Club,* [463 U.S. 680],103 S. Ct. 3274, 3276-77 (1983), it would be an abuse of discretion for the district court to award attorney's fees to a losing party, even though section 1132(g)(1) does not in so many words confine awards of attorney's fees to winners . . . ." *See also Wobith v. ONEAC Corp.,* No. 90-C-5045, 1990 U.S. Dist. LEXIS 17,190 at [*2] (N.D. Ill. Dec. 14, 1990) "Even though [§ 1132(g)(1)] is silent about the need to award only to prevailing parties, the Seventh Circuit has read this provision in conformity with the fee-shifting provisions of § 1988, which require such a limitation."). Thus, in addressing defendants' motion for fees, the court must first determine whether defendants prevailed in this action.

As noted above, plaintiffs initially filed this action on November 24, 1987 seeking the following relief: (a) a court order requiring defendants to provide plaintiffs with true copies of all documents and all information to which plaintiffs are entitled, including an accounting of all transactions affecting the Plan; (b) a court order requiring defendants to distribute to each plaintiff from the Plan all sums to which each plaintiff is entitled, pursuant to the terms of the Plan and applicable law; (c) an award of interest, penalties, attorney's fees, costs, and other monetary amounts to which plaintiffs may be entitled; (d) an award of compensatory and punitive damages from Eisenberg in such amounts as the court and jury shall determine in accordance with

applicable law; and (e) such other relief as the court sees fit, including but not limited to, removal of Eisenberg as administrator and trustee of the Plan.

Although they denied liability, on December 24, 1987, defendants notified plaintiffs that all of the benefits sought would be paid. Defendants made the first payment in January 1988, and the distribution of benefits was completed by April of that year. The remaining issues, including plaintiffs' claims for breach of fiduciary duties, were heard by a jury in January 1990, and, on January 30, 1990, the jury returned a special verdict finding that defendant Alan Eisenberg had, in fact, breached the fiduciary duties owed to each of the plaintiffs. The jury awarded compensatory damages in the amount of $7,500 each to plaintiffs Kathaleen Bassler Harsch, Douglas Bihler, Paula Miller and Lisa Tallar Kuehl, and $25,000 to Thomas Kuehl. On August 30, 1990, following a series of post judgment motions, and after the court granted remittitur, the Clerk of Court in the Eastern District of Wisconsin entered judgment awarding compensatory damages to plaintiffs in the amounts of $709.00 to Paula Miller, $1.00 to Kathaleen Bassler Harsch, $4,800.00 to Douglas Bihler, $3,110.00 to Lisa Tallar Kuehl, and $25,000.00 to Thomas Kuehl. In addition, judgment was entered denying defendants' motion for a new trial on defendants' counterclaim, denying defendants' motion for judgment notwithstanding the verdict and for a new trial on the issue of damages, denying defendants' motion for sanctions, denying plaintiffs' motion for statutory penalties, and granting plaintiffs' motion for attorney's fees and costs.

Based on this judgment, it is clear that plaintiffs prevailed in the action — although they were not awarded punitive damages, plaintiffs received benefits due and owing under the Plan, and they were awarded compensatory damages, fees and costs.

Defendants argue that they prevailed because the court of appeals reversed the award of compensatory damages. The court does not agree. Plaintiffs instituted this action essentially to recover benefits under the Plan, and they did. The court of appeals' decision has no effect on that. It is true that the court of appeals' decision relieves defendants of the obligation to pay compensatory damages. However, plaintiffs still recovered the benefits they sought under the Plan, and defendants remain responsible for plaintiffs' fees and costs. Moreover, as a result of the court of appeals' decision, defendants may now be responsible for statutory penalties. In sum, the court finds that plaintiffs, not defendants, prevailed.

Finally, the court finds that, even if defendants could be considered prevailing parties, they would still not be entitled to attorney's fees. The United States Supreme Court has held that a prevailing defendant in a civil rights action may recover attorney's fees "only where the suit was vexatious, frivolous, or brought to harass or embarrass the defendant." *Hensley v. Eckerhart,* 461 U.S 424, 429 n.2 (1983) (citing H.R. Rep. No. 94-1558, p.7 (1976); *Christiansburg Garment Co. v. EEOC,* 434 U.S. 412, 421 (1978)).[1] The Seventh Circuit's decisions on this issue establish that, in ERISA actions, a defendant requesting fees, in addition to establishing that he or she was the prevailing party, must show that the plaintiff's claim lacks "substantial justification." For example, in *Bittner,* 728 F.2d at 830, the court analogized the awarding of attorney's fees under § 1132(g)(1) to the awarding of fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), which entitles a prevailing

1. In *Hensley,* the Court cited *Christiansburg* for the proposition that "a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff' s action was frivolous, even though not brought in subjective bad faith".

party to reasonable attorney's fees "unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust." The Seventh Circuit reaffirmed the use of the EAJA test in *Van Boxel v. Journal Co. Employees' Pension Trust,* 836 F.2d 1048, 1054 (7th Cir. 1987):

> In *Bitner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 830 (7th Cir. 1984), we interpreted the attorney's fee provision of ERISA as authorizing an award of attorney's fees to the defendant where the plaintiff's claim not only fails but lacks "substantial justification" even though it is not frivolous in the sense of utterly groundless. See also *United Independent Flight Officers, Inc. v. United Airlines, Inc.,* 585 F. Supp. 1206 (N.D. Ill.1984); *Waukesha Engine Division v. Department of Industry, Labor & Human Relations,* 619 F. Supp. 1310, 1318 (W.D. Wis. 1985). Our analysis was rejected by the First Circuit in *Gray v. New England Tel. & Tel. Co.,* 792 F.2d 251, 257-60 (1st Cir. 1986), which decided to adhere to the conventional five-factor test, even though that test is oriented toward the case where the prevailing plaintiff, rather than a prevailing defendant is asking for fees.... Speaking with great respect, we find nothing in the First Circuit's opinion that persuades use to withdraw from *Bittner,* and we shall therefore adhere to it.

Plaintiffs' claims were neither vexatious nor frivolous — the

fact that they recovered benefits due precludes such a finding; nor were plaintiffs claims brought to harass or embarrass defendants. For these reasons, the court finds that defendants are not entitled to recover attorney's fees under 29 U.S.C. § 1132(g)(2).

II. Plaintiffs' Motion For Statutory Penalties And Attorney's Fees

In the motion now before the court, plaintiffs seek statutory penalties under 29 U.S.C. § 1132(c)(1) and attorney's fees under 29 U.S.C. § 1132(g)(1). The court will consider each of these requests separately.

A. Statutory Penalties

Following the jury's return of the special verdict in this action, the court granted plaintiffs' motion for attorney's fees pursuant to 29 U.S.C. § 1132(g)(1) and ordered defendants to pay plaintiffs $47,729.81. The court declined to award statutory penalties, finding as follows:

> Any damage or prejudice suffered by plaintiffs as a result of defendants' failure to freely provide information is directly reflected in the tardy payment of benefits. Even if they accept the proposed remittitur in this case, plaintiffs will receive sizable compensatory damages. Considering the totality of the circumstances, the court finds it unnecessary to consider imposing statutory penalties.

August 2, 1990 Order at 2. Noting that this court "based its decision to deny statutory penalties on a fact that no longer

obtains because of our reversal of the judgment as to compensatory damages," the Seventh Circuit vacated the judgment denying statutory penalties and remanded the action for further proceedings. *Harsch*, 956 F.2d at 662.

ERISA § 502(c)(1) provides as follows:

> Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure to refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c)(1) (West Supp. 1993). The decision to award or deny penalties is committed to the discretion of the district court. The court may award penalties even when there is no provable injury; conversely, the court may deny penalties when there *is* injury. *Harsch*, 956 F.2d at 662. Should the court choose to award penalties, the size of the penalty is committed to the

district judge's discretion. *Ziaee v. Vest*, 916 F.2d 1204, 1210 (7th Cir. 1990), *cert. denied*, 499 U.S. 959 (1991).

> Section 1132(c) specifies penalties "Up to $100 a day," supporting [the] view that the judge must use calendar rather than document days. Yet the statute speaks to failure to comply "with a request for any information." This implies that multiple "requests" could support cumulative penalties, even if the delinquencies overlap.... Unless new requests allow cumulative penalties, there is no marginal deterrent; the plan may well ignore second and subsequent requests.

Ziaee, 916 F.2d at 1210-11. "A judge may consider the number of requests made and the number of documents withheld when exercising discretion within the range of 1¢ to $100 per day, even if the sanction may not exceed $100 per day." *Id.* at 1211. However, before a court will consider imposing statutory penalties, plaintiffs must establish "(1) that the administrator was required by ERISA to make available to the participant the information the participant requested, and (2) that the participant requested and the administrator failed or refused to provide the information requested." *Kleinhans v. Lisle Savings Profit Sharing Trust*, 810 F.2d 618, 622 (7th Cir. 1987) (citing *Clouatre v. Lockwood*, 59 F. Supp. 1136 (M.D. La. 1984)).

Plaintiffs contend that Eisenberg failed and refused to provide information which would have informed plaintiffs of their rights under the Plan; specifically, he failed to provide statements of account, written decisions on requests for benefits, Plan documents and summaries, review/reconsideration of

benefit denials, and information on the location of fund assets or the timing of disbursements. Plaintiffs further contend that there were over 1,000 "document days per plaintiff. Plaintiffs argue that, "[s]ince the rationale for not imposing statutory penalties no longer exists, the court now should impose these penalties based on the egregious conduct of the defendants in refusing to turn over the requested documents." Memorandum in Support of Motion for Statutory Penalties and Attorney's Fees at 8.

The record in this case makes clear that plaintiffs made requests for information and that Eisenberg, the Plan administrator, did not provide that information:

> Beginning with Lisa Taller (now Lisa Kuehl) in May of 1986, the plaintiffs made a number of requests to Eisenberg for information about and distribution of their benefits under the Plan. Tallar wrote to Eisenberg requesting payment of her benefits in May and July, and Paula Miller did the same in September. Neither received a response. Thomas Kuehl made oral requests for a distribution in July and September, which Eisenberg rebuffed with a variety of explanations and excuses why the benefits could not be paid at the time in question.
>
> In January of 1987, Kuehl began to make written requests on behalf of all the plaintiffs for Plan documents and distribution of benefits. These requests continued through September 3, 1987. Eisenberg rebuffed all the requests with increasing hostility.

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Harsch, 956 F.2d at 653. Plaintiffs have documented the following requests for Plan information, summaries and statements, the dates on which responses were due from Eisenberg and the dates on which the information was actually received, If at all:

1. letter from Thomas Kuehl to Alan Eisenberg dated January 29, 1987 requesting statement of accounts for Kuehl and Lisa Tallar; response, due February 28, 1987 and received June 17, 1987, was 109 days late;

2. letter from Kuehl to Eisenberg dated February 12, 1987 requesting statements for all plaintiffs (Kuehl, Tallar, Bihler, Miller and Bassler), and seeking any indication of when funds were to be disbursed; response, due March 14, 1987 and received June 17, 1987, was 95 days late;

3. letter from Bihler to Eisenberg dated March 16, 1987 requesting disbursement of funds due Bihler, plus a written accounting of Bihler's interest in the Plan; response, due April 15, 1987 and received June 17, 1987, was 63 days late;

4. letters from Kuehl to Eisenberg dated April 14,1987 and May 1,1987 renewing request for Plan balance information as to all plaintiffs;

5. letter from Kuehl to Eisenberg dated May 21, 1987, formally requesting benefits and written decisions on claims. A response, due July 21, 1987, was never received, and as of December 24, 1987, was 156 days late.[2]

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2. December 24, 1987 was the date.on which defense counsel wrote to plaintiffs' counsel to state that benefits would be paid. Technically, the letter does not constitute a response. However plaintiffs' chose this conservative cutoff date (Cont'd)

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6. letter from Kuehl to Eisenberg dated June 17, 1987, asking for reconsideration of denial of May 21, 1987 claims and written decisions thereon. A response, due August 2, 1987 as to Kuehl, and July 21, 1987 as to all other plaintiffs was never received, and as of December 24, 1987, was 144 days late as to Kuehl and 156 days late as to Tallar, Bihler, Miller and Bassler;

7. letter from Kuehl to Eisenberg dated July 1, 1987, renewing demand, made on behalf of all plaintiffs, for written decisions on each and every claim. A response, due July 31, 1987, was never received, and as of December 24, 1987, was 145 days late;

8. letter from Kuehl to Eisenberg dated July 13, 1987, requesting a complete copy of the Plan documents and any summaries thereof; response due August 12, 1987 and received December 30, 1987, was 140 days late;

9. letter from Kuehl to Eisenberg dated August 24, 1987, requesting review and reconsideration of Eisenberg's decision to deny lump sum benefit distribution to plaintiffs. A response, due October 8,1987, was never received and as of December 24,1987, was 77 days late;

10. same letter as in the preceding paragraph also requested specific Plan documents including Plan summaries, locations and amounts of assets and annual statements; response, due September 23, 1987 was received on December 30, 1987, the date on which plaintiffs deposed Kathleen Wickert, the Plan accountant, and obtained a number of Plan documents, was 98 days late;

(Cont'd)
because the information conveyed by the letter suggested that benefits would be forthcoming.

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11. letter from Kuehl to Eisenberg dated September 3, 1987 requesting, on behalf of all plaintiffs, a complete accounting of the trust corpus and statements as to where funds were invested, and the terms of those investments; response, due on October 3, 1987 and received on December 30, 1987 when plaintiffs deposed Kathleen Wickert, the Plan accountant, and obtained a number of Plan documents, was 88 days late.

Based on these requests, the court finds that the document days per plaintiff are as follows: (1) Thomas Kuehl, 1,052 document days; (2) Lisa Tallar, 1,064 document days; (3) Douglas Bihler, 1,018 document days; (4) Paula Miller, 955 document days; and (5) Kathaleen Bassler Harsch, 955 document days.

Furthermore, the court finds that, to the extent such prejudice is required, plaintiffs in this action suffered prejudice because defendants' actions, or lack thereof, forced plaintiffs to institute this action in order to recover benefits due and owing under the Plan. *See Curry v. Contract Fabricators, Inc. Profit Sharing Plan,* 891 F.2d 842, 847 n.10 (11th Cir. 1990) (court determined that, if prejudice were required, plaintiff had been prejudiced by defendants's failure to provide the requested documents because defendant's conduct forced plaintiff to hire an attorney, and because defendant's conduct "undoubtedly caused [plaintiff] aggravation and frustration, which courts have recognized as prejudice for purposes of § 1132(c) claims.").

Finally, taking into account the conduct of both sides of this protracted litigation — which has been less than exemplary, the court finds that $1 per document day is an appropriate penalty. Accordingly, defendants shall pay statutory penalties in the amount of $1,052 to Thomas Kuehl, $1,064 to Lisa Tallar Kuehl,

$1,018 to Douglas Bihler, and $955 each to Paula Miller and Kathaleen Bassler Harsch.

B. Attorney's Fees

As noted above, after a jury trial on plaintiffs' compensatory damages claims, the court awarded plaintiffs attorney's fees in the amount of $47,729.81. On appeal, defendants argued that compensatory damages were unavailable to plaintiffs, and that they therefore should not be permitted to recover any attorney's fees incurred in connection with their compensatory damages claims. The Seventh Circuit agreed with defendants, and vacated the award. The Seventh Circuit did not find that plaintiffs were not entitled to recover any attorney's fees; rather, the court held that, on remand, this court should "award the plaintiffs only those fees reasonably attributable to claims that may be brought under ERISA: that is, claims for benefits due, statutory penalties and the like." *Harsch,* 956 F.2d at 663. Thus, the issue on remand is not whether plaintiffs are entitled to recover attorney's fees — this court has already determined that they are, and the Seventh Circuit's order affirmed that determination; the court need only determine the amount of the award.

The Seventh Circuit directed the court to employ the lodestar method for calculating the attorney's fees award, *if feasible. Harsch,* 956 F.2d at 663 (emphasis added). The analysis under this method was described by the United States Supreme Court in *Hensley v. Eckerhart,* 461 U.S. 424 (1983):

> The most useful starting point for determining the amount of a reasonable fee is the number of hours reasonably expended on the litigation multiplied by a reasonable

hourly rate. This calculation provides an objective basis on which to make an initial estimate of the value of a lawyer's services. The party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S. Rep. No. 94-1011, p.6 (1976). Cases may be overstaffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. . . .

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to

> prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that makes the hours reasonably expended a satisfactory basis for making a fee award?
>
> * * *
>
> There is no precise rule of formula for making these determinations. The district court may attempt to identify specific hours that should be eliminated, or it may simply reduce the award to account for the limited success. The court necessarily has discretion in making this equitable judgment. This discretion, however, must be exercised in light of the considerations we have identified.

Id. at 433-37.

As noted above, when it initially considered plaintiffs' request, the court found that plaintiffs were entitled to recover a reasonable attorney fee:

> Certainly the merits clearly favored plaintiffs as to the payout of benefits clearly owed. After the distributions, the parties litigated highly debatable issues. The court allowed a jury trial, a matter itself subject to continuing debate. Though plaintiffs prevailed, the circumstances warranted remittitur.
>
> On balance, the court finds that an award of attorney's fees is appropriate. It might be

> argued that fees should not be awarded for the period subsequent to the date on which vested benefits were paid. Subsequent litigation essentially involved compensatory damages, an issue on which defendants maintained an arguable position in good faith. But had benefits been paid in the first instance, no litigation would have been necessary. With defendant unwilling to settle after paying the benefits, plaintiffs may reasonably have felt compelled to seek compensatory damages (though attorney's fees ultimately constituted the great majority of the amount actually in dispute).

August 2, 1990 Order at 5-6. However, the court was unable to apply the lodestar method for calculating the amount to be awarded:

> Ordinarily, the court would consider the amount of time devoted to various activities or phases of the litigation, and make any appropriate adjustments. The inadequacy of plaintiffs' documentation obliges the court to make an appropriate reduction of the hours claimed. Accurate detailed findings regarding hours spent in various activities are out of the question. Any attempt to parse hours would be extremely speculative. The court will not perform counsel's record keeping function. Carefully recording time spent and compiling hours devoted to various functions may be odious tasks. But care is

> particularly necessary where attorneys are making fee claims. Plaintiffs' counsel has not provided useful samples from which the court might attempt extrapolation. The inadequacy of plaintiffs' counsel's submission is such that the fee claim might be rejected entirely.
>
> Instead, the court will determine the fee equitably, in light of the court's familiarity with the litigation. In short, the court will treat this case as one pursued on a contingent fee basis.

August 2, 1990 Order at 8-9. The court therefore awarded plaintiffs attorney's fees in the amount of one third their total recovery from the litigation. The court did so reluctantly, recognizing that this method of calculation "does not comport with the Seventh Circuit's preferred method of calculation." However, [g]iven the state of counsel's records and counsel's inability to provide clarity, a more specific determination is simply unattainable." August 2, 1990 Order at 9.

1. Reductions for Work on Unsuccessful Claims

The Seventh Circuit found that any award of attorney's fees must be limited to those fees incurred in connection with claims allowed under ERISA, e.g. claims for disbursement of benefits, and statutory penalties. Time spent on plaintiffs' compensatory and punitive damage claims is not compensable. Unfortunately, plaintiffs' records make it impossible to determine for which claim each hour was billed.

In support of their fee request, plaintiffs submitted copies of

invoices and billing statements covering the period from November 2, 1987 through February 28, 1990. These invoices cover fees totalling $152,650.00 and disbursements in the amount of $4,390.39. Because benefits were fully paid by April 1988, any attorney's fees and costs incurred after that date may be attributed only to plaintiffs' claims for compensatory damages, punitive damages, statutory penalties, and attorney's fees and costs. Similarly, because the court struck plaintiffs' punitive damages claim on January 23,1989, any attorney's fees and costs incurred after that date may be attributed only to plaintiffs' claims for compensatory damages, statutory penalties and attorney's fees and costs. Because the records submitted by plaintiffs in support of their request for attorney's fees make it impossible for the court to determine exactly which hours are attributable to each of these claims, unless otherwise indicated, the court will simply presume that the claims required an equal amount of time and effort.[3]

From November 2, 1987 through April 1988, plaintiffs incurred $41,075.00 in fees in connection with claims for benefits, compensatory damages, punitive damages, statutory penalties, and fees and costs. Assuming counsel devoted an equal amount of time to each of these claims, plaintiffs incurred $8,215.00 in fees per claim during this period. Since plaintiffs

3. The court realizes that this may not be a realistic presumption. Again, although the court does not wish to harp on the inadequacy of plaintiffs' counsels' billing documentation, the information contained in plaintiffs' submissions makes it impossible to assign any kind of weighted average to the claims. Plaintiffs' counsel, L. William Staudenmaier, states that it is impossible for him to identify specifically from the invoices and itemized statements the services rendered which do not relate to the compensatory damages claim. Although he estimates that between 50% and 75% of the time spent and fees generated were reasonably attributable to claims brought under ERISA, the court finds that. if such an expenditure was made, it would have been unreasonable.

may recover fees on only three of these claims, the court finds that, at a maximum, $24,645.00 in fees may be awarded. Additionally, plaintiffs claim disbursements in the amount of $1,396.73 for this time period. Again, assuming that disbursements were made equally among the claims, plaintiffs will be permitted to recover only $838.05 in disbursements.

From May 1988 to January 23, 1989, plaintiffs incurred $29,765.00 in fees in connection with claims for compensatory damages, punitive damages, statutory penalties, and fees and costs. Assuming counsel devoted an equal amount of time to each of these claims, and given that plaintiffs may only recover on two of these four claims, the court finds that, at a maximum, $14,882.50 in fees may be awarded for this period. Additionally, plaintiffs claim disbursements in the amount of $1,146.89 for this time period. Again, assuming that disbursements were made equally among the claims, plaintiffs will be permitted to recover only $573.45 in disbursements.

From January 24, 1989 to January 21, 1990, plaintiffs incurred $42,275.00 in fees in connection with claims for compensatory damages, statutory penalties and fees and costs. Assuming that counsel devoted an equal amount of time to each of the claims, and given that plaintiffs may not recover fees incurred on the compensatory damages claim, the court finds that, at a maximum, $28,183.34 in fees may be awarded for this period. Additionally, plaintiffs claim disbursements in the amount of $1,233.06 for this time period. Again, assuming that disbursements were made equally among the claims, plaintiffs will be permitted to recover only $822.04 in disbursements.

From January 22, 1990 to January 30, 1990, the time period during which this action was tried to a jury, plaintiffs incurred $36,356.25 in fees and $322.95 in disbursements. The case was

before the court for trial for six days, with a one-day recess because of bad weather and a two-day weekend recess. Obviously, if the court had concluded that plaintiffs were not entitled to pursue a claim for compensatory damages, no jury trial would have been scheduled. In fact, the court finds that, on plaintiffs' statutory damages claim — the only remaining claim once the compensatory damages claim is eliminated, the court would simply have conducted an evidentiary hearing, and the parties would have been before the court for a maximum of four hours, or one-twelfth of the time actually spent. Accordingly, the court finds that the maximum fees reasonably incurred for this period is $3,029.69. Similarly, only $26.91 in disbursements will be allowed.

From January 31, 1990 to February 28, 1990, plaintiffs incurred $13,202.50 in fees and $290.76 in disbursements. Eliminating one third of the fees and disbursements as relating to the claim for compensatory damages claim, the court finds that, for this period, only $8,801.67 in fees and $193.84 in disbursements may be awarded.

Thus, the maximum award is $79,542.20 in fees and $2,454.29 in disbursements. Next, the court must exclude any hours which are deemed to be excessive or redundant.

2. Reductions for Excessive or Redundant Work

"As the Supreme Court has noted, determining reasonable hours includes some exercise of 'billing judgment' to eliminate hours that are 'excessive, redundant, or otherwise unnecessary.' " *Davidson v. Cook,* 594 F. Supp. 418 (E.D. Va. 1984) (quoting *Hensley v. Eckerhart,* 461 U.S. 424, 103 S. Ct. at 1939-40 (1983)). Unfortunately, the lack of detail in plaintiffs' billing submissions makes it difficult for the court to determine

whether plaintiffs' counsel did, in fact, exercise proper billing judgment, or for that matter, any judgment at all, in making the fee request.

There are several entries on the billing statements which lead the court to believe that plaintiffs' counsel failed to make any attempt to eliminate excessive or repetitive billing. For example, on the invoice dated February 19, 1988, there is an entry dated January 22, 1988 which bears the following description: "Letter from Attorney Chanler; examine enclosures; letter to court and opposing counsel; intra office conference re getting access to Mulcahy & Wherry files; draft letter requesting same." However, on the invoice dated March 17, 1988, there is also an entry dated January 22, 1988 which bears an identical description except that "Attorney Chanler" became "Attorney Chandler." Because the invoices do not show corresponding hour amount for these entries it is impossible for the court to determine whether plaintiffs were double billed. However, nothing on the invoices suggests that these entries were omitted from the fee calculation.

Additionally, based on the invoices which do contain corresponding hour values for the entries, and on the billed audit trail, it appears that plaintiffs' counsel billed in quarter-hour increments. While the court does not condemn plaintiffs' counsel for utilizing this practice in billing its clients, the court will not award fees on this basis — when five minutes of services were provided, the court will award fees for those five minutes only.

For these reasons, the court finds that plaintiffs' request should be reduced by an additional 35% to eliminate excessive or duplicative expenditures of time. While this finding may appear arbitrary, the nature of plaintiffs' submissions forced the court to apply this rather inexact method for determining the appropriate fee award.

Appendix C

Finally, the court finds that given the relative merits of the parties' positions, and the lack of any kind of professional rapport between opposing counsel — a situation which resulted in prolonging this already extremely vexatious litigation — an additional 15% reduction in fees is appropriate.[4] Recovery of benefits due and owing under the Plan — plaintiffs' primary motivation in filing this lawsuit — was accomplished in April 1988. Yet almost six years later, the litigation still has not been closed. Even under today's standards, when the courts' dockets are spilling over and civil cases are stacked up awaiting trial, this case has lived a ridiculously long life. Although the court has affirmed the merit of plaintiffs' complaint, the length of this litigation, and the amount of time and energy spent therein has

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4. Upon initially considering the appropriate attorneys' fee award, the court stated as follows:

> The case was reasonably complex, but this complexity is reflected in counsel's employment of attorneys, paralegals and clerks possessing various degrees of experience and kinds of expertise. Moreover, plaintiffs' counsel pursued this case with excessive zeal, reflected in unparalleled vexatiousness evident throughout this litigation. These factors could only hinder efficient resolution of this matter and would inevitably result in a significant fee reduction. That defendant Eisenberg might arouse such passion in attorneys is not the issue. Plaintiffs' counsel are responsible for their own self-control. Excessive zeal to the point of overkill often proves a disservice to one's client. Plaintiffs will be awarded attorneys' fees in the amount of one-third the vested benefits recovered and one-third the jury award after the remittitur offered by the court.

August 2, 1990 Order at 9.

been, in large part, due to counsels' inability and/or refusal to be accommodating in any way.

After making the additional reductions, the court finds that the appropriate fee to be awarded to plaintiffs in this action is $39,771.10. In addition, plaintiffs will be permitted to recover disbursements in the amount of $1,227.15.

CONCLUSION

For the reasons set forth above, the court finds that defendants did not prevail in this action and are therefore not entitled to recover attorney's fees from plaintiffs. Although it is true that defendants successfully defeated plaintiffs' compensatory damages claim on appeal, plaintiffs recovered the benefits sought under the Plan, and this was their primary motivation in filing this action in the first place.

The court finds that plaintiffs *did* prevail and are therefore entitled to recover the attorney's fees reasonably attributable to plaintiffs' pursuit of those claims permissible under ERISA — claims for benefits due and statutory penalties for example. The fact that plaintiffs recovered benefits by April 1988, yet continued this action for years afterward, has given the court pause. The court fully recognizes that, as a matter of policy, we want to encourage employees to take action to recover benefits due from an employer or Plan administrator. However, in this particular action, the court was forced to balance against this policy another policy; that of wanting to discourage the use of excessive measures to further the overzealous pursuit of questionable claims.

Finally, the court finds that defendant Eisenberg's conduct in

repeatedly refusing to provide requested information and benefits, warrants the imposition of statutory penalties. Accordingly,

IT IS ORDERED that defendants' motion for attorney's fees be and the same is hereby DENIED; and,

IT IS FURTHER ORDERED that plaintiffs' motion for statutory penalties pursuant to 29 U.S.C. § 1132(c) be and the same is hereby GRANTED; defendant Eisenberg is hereby directed to pay statutory penalties in the amount of $1,052 to Thomas Kuehl, $1,064 to Lisa Tallar Kuehl, $1,018 to Douglas Bihler, and $955 each to Paula Miller and Kathaleen A. Bassler Harsch and,

IT IS FURTHER ORDERED that plaintiffs' motion for attorney's fees pursuant to § 1132(g)(1) be and the same is hereby GRANTED in the amount of $40,998.25 ($39,771.10 in fees plus $1,227.15 in disbursements).

The clerk is directed to enter judgment accordingly.

Dated at Milwaukee, Wisconsin this 4th day of February, 1994.

BY THE COURT:
s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge

APPENDIX D — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED OCTOBER 5, 1992

___ U.S. ___, 113 S. Ct. 61, 121 L. Ed. 2d 29

No. 91-1835. Douglas M. Bihler, et al., Petitioners v Alan D. Eisenberg, et al.

October 5, 1992. Petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit denied.

Same case below, 956 F2d 651.

APPENDIX E — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT DATED FEBRUARY 19, 1992

Kathaleen A. Bassler HARSCH, Douglas M. Bihler, Thomas D. Kuehl, Paula C. Miller, and Lisa P. Tallar-Kuehl, Plaintiffs-Appellees, Cross-Appellants,

v.

Alan D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C., the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and Alan D. Eisenberg, S.C., a Wisconsin service corporation, Defendants-Appellants, Cross-Appellees.

Nos. 90-3169, 90-3303.

United States Court of Appeals,
Seventh Circuit.

Argued Sept. 6, 1991.

Decided Feb. 10, 1992.

As Amended Feb. 19, 1992.

Former employees brought suit under ERISA for unpaid benefits. The United States District Court for the Eastern District of Wisconsin, J.P. Stadtmueller, J., awarded benefits and compensatory damages, but denied punitive damages. Defendants appealed and employees cross-appealed. The Court of Appeals, Cudahy, Circuit Judge, held that: (1) extracontractual compensatory damages are not available in action by individual

beneficiary; (2) punitive damages are not available in action by beneficiary; (3) district court did not abuse its discretion in denying defendants' motion for Rule 11 sanctions; and (4) lodestar method would be more appropriate basis for award of attorney fees.

Affirmed in part, reversed in part, vacated in part and remanded.

Flaum, Circuit Judge, filed concurring opinion.

* * *

L. William Staudenmaier, Brian C. Tyndall (argued), Paul J. Hinkfuss, Cook & Franke, Milwaukee, Wis., for plaintiffs-appellees.

Alan M. Levy (argued), Steven J. Slawinski, O'Neil, Cannon & Hollman, Milwaukee, Wis., for defendants-appellants.

Before CUDAHY and FLAUM, Circuit Judges, and ROSZKOWSKI, Senior District Judge.*

CUDAHY, Circuit Judge.

The principal question presented by this appeal is whether either extracontractual compensatory or punitive damages may be recovered by a beneficiary in an action for breach of fiduciary duty under ERISA. The district court held that punitive damages were not available in such an action, but that the compensatory

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* Honorable Stanely J. Roszkowski, Senior District Judge of the United States District Court for the Northern District of Illinois, sitting by designation.

damages sought by the plaintiffs were. We affirm the district court's holding as to punitive damages, but reverse on the issue of compensatory damages. We also affirm the denial of sanctions under Fed.R.Civ.P. 11, and vacate and remand the rulings on attorney's fees and sanctions under ERISA.

I.

This remarkably vexatious litigation arose out of a dispute between defendant Alan D. Eisenberg and some of his former employees over the distribution of the employees' pension benefits. Eisenberg is the president and sole director of defendant Alan D. Eisenberg, S.C., a Milwaukee law firm. The plaintiffs are former employees of the firm who left at various times during 1986.[1] Prior to leaving the firm, all were participants in the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan (the Plan), of which Eisenberg was and is the named trustee and administrator.

Beginning with Lisa Tallar (now Tallar-Kuehl) in May of 1986, the plaintiffs made a number of requests to Eisenberg for information about and distribution of their benefits under the Plan. Tallar wrote to Eisenberg requesting payment of here benefits in May and July and Paula Miller did the same in September. Neither received a response. Thomas Kuehl made oral requests for a distribution in July and September, which Eisenberg rebuffed with a variety of explanations and excuses why the benefits could not be paid at the time in question.

In January of 1987, Kuehl began to make payments written requests on behalf of all the plaintiffs for Plan documents and

1. Douglas Bihler left in March, Lisa Tallar inApril, Kathaleen Bassler Harsch in May and Thomas Kuehl and Paula Miller in August.

distribution of benefits. These requests continued through September 3, 1987. Eisenberg rebuffed all the requests. with increasing hostility. [2] The plaintiffs contended that according to the firm's practice and policy they were entitled to their benefits shortly after their departures from the firm. Eisenberg responded that the plaintiffs were not entitled to any payment until they reached retirement age (59 years), and demanded that the plaintiffs produce some "statutory, or contractual, authority" for their demands for information and benefits.

The plaintiffs filed this lawsuit against Eisenberg, Alan D. Eisenberg, S.C. and the Plan on November 24, 1987. The complaint alleged that Eisenberg had refused to comply with the plaintiffs' written requests for information and claims for benefits, in violation of the terms of the Plan, the policy and practice of the firm and ERISA. In addition to Plan documents

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2. For example, on May 12, 1987, Eisenberg wrote to Kuehl:

> With respect to your pension and profit sharing accounts, we expect to be making a decision shortly as to whether or not we will be paying you off at age 59. Stay tuned.

On June 13, 1987, Eisenberg wrote:

> Kindly provide me with any authority that you may have that obligates me to pay you off before the year 2007. Unless you have some statutory, or contractual, authority, please do not contact me before June 30, 2007.
>
> . . . .
>
> As to meeting with you at 5 00 p.m. on Monday,

(Cont'd)

and benefits, the plaintiffs sought compensatory, and punitive damages. On December 16, the defendants filed their answer, in which they denied all liability, asserted that Kuehl had been responsible for administering the Plan and that therefore any alleged noncompliance with ERISA was a result of his actions, and requested costs and fees under Rule 11. Nevertheless, on December 24, 1987, the defendants notified the plaintiffs that all of the benefits sought by the plaintiffs would be paid. The plaintiffs received their first payment of benefits in January of 1988 (the defendants had offered to make payments in December, but the plaintiffs rejected the offer for tax reasons). Distribution was largely completed by March, with a few minor adjustments in April.

The defendants continued to deny liability for compensatory or punitive damages, and in April filed a counterclaim against Kuehl alleging that he had been a fiduciary with respect to the Plan during his employment with the firm and that he had breached his duties as a fiduciary by failing to ensure that the Plan

(Cont'd)

> June 15, 1987, I do not wish to get into any arguments with you. I understand Peking, China, is nice at this time of the year, and I might consider meeting with you there but only if you can speak Chinese.

And on August 28, 1987:

> We are presently in receipt of your August 24, 1987, letter. Thank you for the marvelous collection of dog sled stamps on the envelope. The thought of your staff putting their "little" tongues on the backs of those stamps is just mind boggling, boggle, boggle, boggle.

Not surprisingly, this letter went on to refuse the plaintiffs' requests for payment and for documents regarding the Plan.

complied with its obligations under ERISA. The defendants also moved to dismiss the complaint on the ground that neither compensatory nor punitive damages are available in an action brought by individual beneficiaries under ERISA. The court denied the motion dismiss the compensatory damages claim, but agreed with the defendants that punitive damages could not be recovered under ERISA, and dismissed the plaintiffs' claim for such damages. The claim for compensatory damages and the counterclaim against Kuehl were tried to a jury over the defendants' objection. The jury ruled for the plaintiffs on both issues, and awarded $7,500 each to Tallar, Miller, Douglas Bihler and Kathaleen Bassler Harsch, and $25,000 to Kuehl. On the defendants' motion, all the awards except Kuehl's were subjected to substantial remittiturs on the ground that they bore no reasonable relationship to the evidence.

II.

The civil enforcement provisions of ERISA appear in section 502(a) of the statute. That section provides in pertinent part:

> A civil action may be brought —
>
> (1) by a participant or beneficiary —
>
> . . . . .
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

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. . . . .

> (3) by a participant, beneficiary or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a) (1988). The plaintiffs argue that both extracontractual compensatory and punitive damages are recoverable under either section 502(a)(1)(B) or section 502(a)(3)(B). The defendants contend that neither type of relief is available under any provision of section 502. We deal with each type of damages in turn.

A. *Compensatory Damages*

The plaintiffs in this case sought a variety of damages that arose from the defendants' delay in payment of their benefits. Paula Miller claimed that she incurred additional interest expense on her credit card balance, which she would have paid off earlier if she had received the benefits due her from the Plan. Tom Kuehl and Lisa Tallar-Kuehl testified that the delay in payment caused their distributions to be subject to the less favorable provisions of the then-new Tax Reform Act of 1986. Douglas Bihler claimed that the delay forced him to forgo hiring a secretary for his new law practice for four months, which limited the time he could devote to billable work and resulted in a loss of income.[3] The

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3. The other plaintiff, Kathaleen A. Bassler Harsch, offered no evidence of any actual loss resulting from the delay in distribution of her benefits.

defendants argue that all of these damages are extracontractual in nature and therefore not recoverable under either section 502(a)(1)(B) or section 502(a)(3) of ERISA.[4]

1. Section 502(a)(1)(B)

In *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134,105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), a beneficiary of an ERISA-governed employee benefit plan sued the plan administrator for compensatory and punitive damages arising out of the administrator's delay in processing her claim for disability benefits. The Ninth Circuit found that the petitioner had stated cause of action under section 409(a) of ERISA that could be asserted by a beneficiary under section 502(a)(2). The Supreme Court reversed, holding that "extracontractual damages caused by improper or untimely processing of benefit claims," *id.* at 136, 105 S.Ct. at 3087, may not be recovered in an action brought by a beneficiary to redress a violation of section 409(a).

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4. The district court did not explicitly state under which provision of section 502 the plaintiffs' compensatory damages were recoverable. In addressing the plaintiffs' demand for jury trial, however, the court stated:

> Plaintiffs' jury trial right arises solely under 29 U.S.C. § 1132(a)(1)(B). Other ERISA provisions for civil enforcement appear inapplicable (see above discussion of 29 U.S.C. § 1132(a)(2)) or do not afford a right to jury trial. *See, e.g., Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3d Cir. 1988)

Order at 6 (Jan. 23, 1989). *Cox* holds that there is no right to a jury in a case brought under section 502(a)(3). Since the district court held that the plaintiffs in this case *were* entitled to a jury trial on their claims for compensatory damages, the court must have understood those claims to arise under section 502(a)(1)(B).

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The *Russell* Court did not expressly consider whether extracontractual damages might be available under ERISA section 502(a)(1)(B). Nevertheless, its opinion has important implications for that issue. In support of its holding, the *Russell* Court made the following observation:

> Significantly, the statutory provision explicitly authorizing a beneficiary to bring an action to enforce his rights under the plan — 502(a)(1)(B) . . . says nothing about the recovery of extracontractual damages, or about the possible consequences of a delay in the plan administrators' processing of a disputed claim. Thus, there really is nothing in the statutory text to support the conclusion that such a delay gives rise to a private right of action for compensatory or punitive relief.

Id. at 144, 105 S.Ct. at 3091. The Court also found that, in light of ERISA's carefully crafted remedial scheme, the complete absence in section 502(a) of any mention of extracontractual damages demonstrates Congress' deliberate intent not to afford such a remedy:

> The six carefully integrated civil enforcement provisions found in § 502(a) of the statute as finally enacted . . . provide strong evidence that Congress did *not* intend to authorize other remedies that it simply forgot to incorporate expressly.

Id. at 146-47, 105 S.Ct. at 3092 (citation omitted) (emphasis in original).

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We can see — particularly as illustrated by the case at bar — good reasons to allow beneficiaries to recover extracontractual damages under ERISA. But the Fourth Circuit, relying on *Russell,* has held that extracontractual compensatory damages are not available under section 502(a)(1)(B) *See Reinking v. Philadelphia American Life Ins. Co.,* 910 F.2d 1210 (4th Cir. 1990) (denying claim for extracontractual damages for emotional distress). Although the policy implications in cases such as the one before us may be troubling, we have no choice but to agree. Any other conclusion would appear to be at odds with the plain meaning of the Supreme Court's statements in *Russell.* Another interpretation would also seem to do some violence to the language of section 502(a)(1)(B), which appears to limit beneficiaries to *contractual* claims by providing only for actions based upon or arising "under the terms of the plan."

The question, then, is whether the plaintiffs' damage claims in this case are "extracontractual" within the meaning of *Russell.* The plaintiffs argue that their claims are within the scope of section 502(a)(1)(B) because the plaintiffs are attempting to enforce their right "under the terms of the plan" to "proper treatment by the plan fiduciary under 29 U.S.C. § 1104(a)(1)." We reluctantly conclude, however, that the plaintiffs' damages in this case cannot be distinguished in any principled way from those claimed by the plaintiff in *Russell,* and are therefore not recoverable under section 502(a)(1)(B).

The *Russell* plaintiff alleged that the plan administrator's improper interruption of her benefit payments "forced [her] disabled husband to cash out his retirement savings which, in turn, aggravated the psychological condition that caused [her] back ailment." 473 U.S. at 137, 105 S.Ct. at 3087. Thus, like the plaintiffs in this case, she sought compensation for injuries that

resulted directly from the administrator's alleged breach of fiduciary duty. The plaintiffs try to draw a distinction between their injuries and Russell's based on the fact that Russell's injuries were physical while their own are financial. But this fact does not make the plaintiffs' claims any more "contractual" than those in *Russell.* The Court did not consider Russell's claims "extracontractual" on the theory that they sought compensation for physical injuries, but because they were distinct from the "benefits to which she [was] contractually entitled," which she had already received. *Id.* at 136, 105 S.Ct. at 3087. The same is true of the plaintiffs' claims in the case before us. The plaintiffs' attempt to characterize their suit as seeking to enforce a contractual right to "proper treatment" under the terms of the Plan is ingenious. But the *Russell* claim was susceptible of precisely the same characterization: the plan administrator there had the same fiduciary duty as the administrator here, and hence the plaintiff had the same right to proper treatment. In neither case did the "terms of the plan" entitle beneficiaries to compensatory damages resulting from a delay in payment of benefits.

Finally, we do not think it appropriate to find an *implied* remedy of compensatory damages in this case. The *Russell* Court explicitly cautioned against implication of remedies under ERISA:

> We are reluctant to tamper with an enforcement scheme crafted with such evident care as the one in ERISA.... "[W]here a statute expressly provides a particular remedy or remedies, a court must be chary of reading others in to it."

Id. at 147, 105 S.Ct. at 3093 (quoting *Transamerica Mortgage Advisors, Inc v. Lewis,* 444 U.S. 11, 19, 100 S.Ct. 242, 247, 62 L.Ed.2d 146 (1979)). The Court has also emphasized in other decisions its strong opposition to the judicial expansion of ERISA's remedies or causes of action. In *Pilot Life Ins. Co. v. Dedeaux,* 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), the Court held that ERISA preempted plaintiff's state law tort and contract damage claims arising from the allegedly improper processing of his benefit claim. In so holding, the Court stated:

> In sum, the detailed provisions of § 502(a) set forth a comprehensive civil enforcement scheme that represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Id at 54,107 S.Ct. at 1556; *see also Metropolitan Life Ins. Co. v. Taylor,* 481 U.S; 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987). Therefore, we believe that extracontractual compensatory damages, such as those sought by the plaintiffs here, are not available in an action by an individual beneficiary under section § 502(a)(l)(B).

2. Section 502(a)(3)

We are also dubious about the plaintiffs' contention that

their claims for extra contractual damages are sustainable as "other appropriate equitable relief" under ERISA section 502(a)(3). Compensatory damages are a classic form of *legal*, not equitable, relief. In its report on ERISA, the Senate Finance Committee discussed "appropriate equitable relief" in the following terms:

> Appropriate equitable relief may be granted in a civil action. For example, injunctions may be granted to prevent a violation of fiduciary duty, and a constructive trust may be imposed on the plan assets. . . . Also, the bill specifically provides that a fiduciary may be removed through civil action brought by the Secretary or participants or beneficiaries. . . .

S.Rep. No. 383, 93d Cong., 2d Sess., *reprinted in* 1974 U.S.C.C.A.N. 4890, 4989. Based in part on this passage, the Ninth Circuit has held that "appropriate equitable relief" under section 502(a)(3). does not include extracontractual compensatory damages. *See Sokol v. Bernstein*, 803 F.2d 532 (9th Cir.1986). As the court stated in that case:

> [I]t appears that Congress used the word "equitable" to mean what it usually means — injunctive or declaratory relief. The [Senate Finance Committee's] definition of "appropriate equitable relief lists three distinct remedies (injunction, constructive trust, and removal), all of which are closely tied to the plan. For us to add an extra-contractual remedy to a list of remedies so

> strongly contractual in nature would be to step beyond the province of the judiciary and into that of the legislature.

Id. at 537-38. The First Circuit has also ruled that "other appropriate equitable relief" does not encompass a beneficiary's claim for extracontractual damages. *See Drinkwater v. Metropolitan Life Ins. Co.*, 846 F.2d 821, 824 (1st Cir.), *cert. denied*, 488 U.S. 909,109 S. Ct. 261,102 L. Ed. 2d 249 (1988); *see also Powell v.Chesapeake & Potomac Tel. Co.*, 780 F.2d 419, 424 (4th Cir.1985). *cert. denied*, 476 U.S. 1170, 106 S.Ct. 2892, 90 L.Ed.2d 980 (1986) (rejecting plaintiff's argument that beneficiaries may seek extra-contractual damages from a fiduciary as "other appropriate equitable relief" under traditional principles of trust law which Congress intended to engraft upon ERISA).

The Supreme Court has never addressed the availability of extracontractual damages under section 502(a)(3). In fact, the Court specifically reserved that question in *Russell.* Nevertheless, most circuits have found much of the *Russell* Court's reasoning in holding that extracontractual damages are not available under ERISA section 409(a) equally applicable to section 502(a)(3). With one exception, every circuit that has addressed the issue since *Russell* has held that extracontractual damages may not be recovered under section 502(a)(3). *See McRae v. Seafarers' Welfare Plan*, 920 F.2d 819, 821 (11th Cir. 1991); *Drinkwater*, 846 F.2d at 824; *Sokol*, 803 F.2d at 538; *Powell*, 780 F.2d at 424. *See also Forys v. United Food & Commercial Workers Int'l Union*, 829 F.2d 603, 604 n. 2 (7th Cir.1987) (dicta); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1464 (5th Cir. 1986) (dicta).

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The Ninth Circuit's opinion in *Sokol* (whatever may be our view of the outcome) makes some telling points. The *Sokol* court first noted that section 502(a)'s "other appropriate equitable relief" clause is strikingly similar to section 409(a)'s "other appropriate equitable or remedial relief" clause, under which the Supreme Court in *Russell* refused to infer a cause of action for extra-contractual damages. The court also found "considerable support in *Russell* for the proposition that no provision in ERISA authorizes the award of extra-contractual damages." *Sokol*, 803 F.2d at 535. In particular, the court noted that "*Russell* held that the fiduciary duties set forth in § 409 run only to the plan, and not to individual beneficiaries. In so holding, the *Russell* Court used language implying that *all* of the statute's provisions relating to fiduciary duties run only to plans, and not to beneficiaries as individuals." *Id.* (citation omitted) (emphasis in original). The Ninth Circuit also emphasized the Russell Court's reliance on "Congress' glaring omission of any mention of extra-contractual damages." *Id.* at 536. As the court concluded:

> [I]t must be noted that § 502(a)(3) also "says nothing about the recovery of extra-contractual damages," *Russell*, 105 S.Ct. at 3091, and emphasizes protection of the *plan*, not the direct protection of the beneficiaries. So viewed, the catchall phrase of "other appropriate equitable relief" in § 502(a)(3) provides no more foundation for an award of emotional distress damages than does the same catchall [sic] phrase in § 409(a).

Id. (emphasis in original). If anything, section 502(a)(3) may provide even less support for an award of compensatory damages than does section 409(a) since only the latter provides for "other remedial relief" in addition to "appropriate equitable relief."

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This court has relied on the reasoning of *Russell* in addressing the closely related question of punitive damages, holding that such damages are not an available remedy under section 502(a)(3) of ERISA. *Kleinhans v. Lisle Sav. Profit Sharing Trust*, 810 F.2d 618 (7th Cir. 1987). Like the Ninth Circuit, we placed particular emphasis on the *Russell* Court's observation regarding the "stark absence" of support for such a remedy in the statutory text and the legislative history of ERISA, and on the presumption that such absence indicated that Congress had deliberately excluded the remedy from ERISA's comprehensive remedial scheme. *Id.* at 626. We also found that these observations were relevant to section 502(a)(3) as to section 409(a). The reasoning we applied to *punitive* damages in *Kleinhans* leads us to conclude that extracontractual *compensatory* damages are equally unavailable under section 502(a)(3).

The plaintiffs, however, argue that the Sixth Circuit's decision in *Warren v. Society National Bank*, 905 F.2d 975 (6th Cir. 1990), supports their position that the damages they seek are recoverable as "other equitable relief" under section 502(a)(3). In *Warren*, the Sixth Circuit held that a plan beneficiary could recover damages under section 502(a)(3) for the increased tax liability he incurred as a result of the plan administrator's failure to carry out the beneficiary's instructions in transferring his share of the plan assets. The court found that *Russell* did not preclude recovery of these damages because the plaintiff's claim in *Warren* "differ[ed] from that of the plaintiff in *Russell* in two respects: (1) the nature of the alleged injuries and the relief sought, and (2) the statutory bases for the claim." *Id.* at 980.

According to the Sixth Circuit, Dr. Warren's claim differed from that of the plaintiff in *Russell* because in Dr. Warren's case

the plan administrator "violated a contractual duty under the retirement plans to distribute his plan assets in accordance with his instructions." *Id.* The injuries Dr. Warren suffered were "direct injuries resulting from" that breach. *Id.* The *Russell* plaintiff, by contrast,

> made no claim that the fiduciary of her disability plan violated a contractual duty. In fact, the plaintiff had received all the benefits to which she was contractually entitled. Also, rather than seeking damages for direct injuries, the plaintiff sought punitive damages and damages for the consequential injuries of emotional distress and the necessity of cashing out her husband's retirement savings.

Id. Though well-intentioned, we do not find compelling the attempt to distinguish the injuries claimed by Dr. Warren from those alleged by the plaintiff in *Russell.* The *Russell* Court made no mention of the "directness" of the plaintiff's injuries in characterizing her claims as "extracontractual." Further, to the extent that one can draw a legitimate distinction between the two cases based on the "contractual duty" allegedly violated by the defendants in *Warren,* that distinction would appear to hurt rather than help the plaintiffs in the case at bar. As we have noted, the "contractual duty" alleged here existed in *Russell,* as well, and presumably in every other case that has involved a violation of fiduciary duty. It would be difficult to treat this case differently based solely on the plaintiffs' artful framing of the issue.

More significant to the Sixth Circuit's decision were the different statutory bases of the two actions. The court correctly

observed that because Dr. Warren had brought his action under section 502(a)(3) rather than section 409(a), *Russell* was not dispositive. The court went further, however, stating that "since the majority opinion in *Russell* did not deal with section 502(a)(3), questions arising under that section remain open." *Id.* at 981. Although literally correct, this observation ignores some of the broader implications of the *Russell* Court's reasoning. Rather than following those implications, the Sixth Circuit apparently relied heavily on the reasoning of Justice Brennan's concurring opinion in *Russell.* That separate opinion argued cogently that ERISA was intended to incorporate the law of trusts and therefore "a beneficiary is entitled to a remedy 'which will put him in the position in which he would have been if the trustee had not committed the breach of trust.' " *Russell,* 473 U.S. at 157 n. 16, 105 S.Ct. at 3098 n.16 (Brennan, J., concurring in the judgment) (quoting Restatement (Second) of Trusts § 205, and Comment a (1959)); That remedy may include monetary damages. *Id.* at 154 n. 10, 105 S.Ct. at 3096 n. 10.

There is a good deal to be said for Justice Brennan's position on grounds of policy and, perhaps, of justice. But it is not a position endorsed by the Supreme Court majority in *Russell.* As Justice Brennan observed in his concurrence:

> There is dicta in the Court's opinion . . . that could be construed as sweeping more broadly than the narrow ground of resolution set forth above. Although the Court takes care to limit the binding effect of its decision to the terms of § 409, its opinion at some points seems to speak generally of whether fiduciaries ever may be held personally liable to beneficiaries for extracontractual damages.

Russell, 473 U.S. at 150-51, 105 S.Ct. at 3094-95 (Brennan, J., concurring in the judgment). Although we might be sympathetic to the finding of a broader remedy in section 502, the *Russell dicta*, which commanded majority support in the Supreme Court and have generally carried the day in the courts of appeals, seem to require us to reject extracontractual remedies. While a broader remedial view might serve the ends of justice in the case before us, we do not think such a view is consistent with the reasoning of *Russell*.

The plaintiffs' final and perhaps most persuasive argument is that the Supreme Court adopted their position in the recent decision of *Ingersoll-Rand Co. v. McClendon*, __ U.S. __, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990). The immediate issue in *Ingersoll-Rand* was not the availability of extracontractual damages under ERISA, but the scope of ERISA's preemption of state law claims. Perry McClendon claimed that Ingersoll-Rand had fired him in order to "avoid making contributions to his pension fund." *Id.* 111 S.Ct. at 481. McClendon sued the company in Texas state court under various tort and contract theories, seeking compensatory and punitive damages. *Id.* The Supreme Court, in an opinion by Justice O'Connor, held that McClendon's causes of action under state law were preempted by ERISA. The basis of the plaintiff's argument, however, is not the actual holding of *Ingersoll-Rand* but the final paragraph of the opinion, in which Justice O'Connor wrote:

> The preceding discussion also responds to the Texas court's attempt to distinguish this case as one not within ERISA's purview. . . . [T]here is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the

> relief requested here is well within the power of federal courts to provide. Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. 111 S.Ct. at 486. Based on this surprising language, the plaintiffs argue with considerable plausibility that *Ingersoll-Rand* supports their claims for extracontractual damages, including punitive damages, under ERISA.

Some courts have indeed read *Ingersoll-Rand* as overruling *Russell* and its progeny. In *Blue Cross and Blue Shield v. Lewis,* 753 F.Supp. 345 (N.D.Ala.1990), the Northern District of Alabama stated: "According to *Ingersoll-Rand,* a court, state or federal, in an ERISA case, may, as an ERISA remedy, award extra-contractual, even punitive, damages, that is, if the facts call for such a remedy." *Id.* at 347. *See also International Union, United Automobile, Aerospace and Agricultural Implement Workers v. Midland Steel Products Co.,* 771 F.Supp. 860, 863 (N.D.Ohio 1991) ("The Supreme Court's holding in *Ingersoll-Rand v. McClendon* . . . conclusively establishes the availability of legal remedies under ERISA."); *Haywood v. Russell Corp.,* 584 So.2d 1291, 1297 (Ala. 1991) ("The Supreme Court, in *Ingersoll-Rand,* has now specifically held that the courts are authorized to award damages, both extracontractual, and even punitive, where the facts support them, even though they are not specifically provided for in ERISA.").

Other courts disagree. In *O'Neil v. Gencorp, Inc.,* 764 F.Supp. 833 (S.D.N.Y.1991), the Southern District of New York granted GenCorp's motion to dismiss the plaintiffs' claim for punitive damages on the ground that punitive damages are

unavailable as a remedy for breach of fiduciary duty under ERISA. Rejecting the plaintiffs' argument that *Ingersoll-Rand* supported their claim for punitive damages, the Southern District observed:

> Had Justice O'Connor intended, as plaintiffs claim, that [her] analysis of § 510 was overruling the considerable amount of federal case law barring punitive and extracontractual damages under ERISA (particularly the cases which specify that punitive damages are unavailable under § 510), she undoubtedly would have so stated.
>
> Furthermore, since Justice O'Connor's *dicta* in *Ingersoll-Rand* discusses remedies under § 502(a) generally and are not limited to § 502(a)(3), one would also expect an explanation of the effect on *Russell's* holding that punitive damages are unavailable under § 502(a)(2), as well as a distinction from *Russell's* elaborate rationale for generally excluding punitive damages in ERISA actions.

Id. at 834. *See also Gaskell v. Harvard Coop. Society,* 762 F.Supp. 1539, 1544 (D.Mass.1991) ("[H]ad the Supreme Court intended to expand the realm of potential relief available under ERISA, . . . it would have done so explicitly. Such a departure from precedent likely would not have been accomplished in a single sentence, in dicta, at the close of an opinion focused exclusively on a wholly different issue."); *Monfiletto v. John Hancock*

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Healthplans, Inc., Civ. No. 90-5137, 1991 WL 231608, at *2, 1991 U.S. Dist Lexis 15875, at *5 (E.D.Pa Oct. 30, 1991). The Eleventh Circuit, in holding that extracontractual damages are not available under section 502(a)(3), explicitly found that such a holding did not conflict with *Ingersoll-Rand. See McRae v. Seafarers' Welfare Plan,* 920 F.2d 819 (11th Cir.1991). Judge John Minor Wisdom, sitting by designation, explained the *Ingersoll-Rand* dicta as follows:

> The Supreme Court was stating that federal law provides relief for ERISA actions other than those that seek to recover pension benefits, such as the plaintiff's cause of action for wrongful termination. The Supreme Court is not holding that the specific *remedies* this plaintiff had sought under state law are necessarily the remedies that will be afforded him should he be granted *relief* under ERISA 502.

Id. at 821.

Although we do not necessarily subscribe to this or any other explanation of what the Supreme Court might have meant by the *Ingersoll-Rand* dicta, we are not rash enough to believe that the Court intended to overrule settled law in most of the circuits, as well as narrowly limit — if not overrule — its own decision in *Russell* in such an off-hand manner. Of course, we do have a "plain meaning" argument to contend with. And it is possible that Justice O'Connor *did* intend to limit *Russell* severely. Nevertheless, we think the prudent course is to follow Judge Wisdom in his interpretation. We will continue to doubt the availability of extracontractual damages under ERISA until a more plau sible signal reaches us from above.

Appendix E

B. *Punitive Damages*

Although the district court allowed the plaintiffs' compensatory damage claims to be tried, it dismissed their claims for punitive damages on the ground that such damages are not available in an action by a beneficiary under either section 502(a)(1)(B) or section 502(a)(3) of ERISA. The plaintiffs have cross-appealed that ruling.

1. Section 502(a)(1)(B)

In dismissing the plaintiffs' claims for punitive damages under section 502(a)(l)(B), the district court explicitly relied on the Supreme Court's decision in *Russell.* As noted, the Court held in *Russell* that extracontractual compensatory and punitive damages are not available in an action for breach of fiduciary duty brought by a beneficiary to redress a violation of section 409(a) of ERISA. Based on the Court's reasoning in that case, we have held that extracontractual compensatory damages are also not recoverable under section 502(a)(l)(B). The same reasoning supports the district court's conclusion that punitive damages are similarly unavailable under section 502(a)(1)(B). The *Russell* Court treats compensatory and punitive damages together, under the rubric of "extracontractual damages." Therefore, if *Russell* means that beneficiaries cannot recover extracontractual compensatory damages under section 502(a)(1)(B), then punitive damages must be unavailable as well.

2. Section 502(a)(3)

This court has already held that punitive damages are not recoverable under section 502(a)(3). *See Kleinhans v. Lisle Savings Profit Sharing Trust,* 810 F.2d 618, 627 (7th Cir.1987).

This holding is consistent with that of every other circuit that has addressed the issue. *See Amos v. Blue Cross-Blue Shield,* 868 F.2d 430 (11th Cir.), *cert. denied,* 493 U.S. 855, 110 S.Ct. 158, 107 L.Ed.2d 116 (1989); *Pane v. RCA Corp.,* 868 F.2d 631, 635 n. 2 (3d Cir.1989); *Drinkwater v. Metropolitan Life Ins. Co.,* 846 F.2d 821 (1st Cir.1988); *Varhola v. Doe,* 820 F.2d 809 (6th Cir. 1987); *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.,* 793 F.2d 1456 (5th Cir. 1986); *Sokol v. Bernstein,* 803 F.2d 532 (9th Cir.1986); *Powell v. Chesapeake & Potomac Tel Co.,* 780 F.2d 419 (4th Cir. 1985).[5]

III.

In addition to their primary claims regarding the availability of compensatory and punitive damages under ERISA, the parties allege error in the district court's rulings on a number of other issues. Specifically, the defendants appeal the court's rulings that the plaintiffs had a right to a jury trial on their claim for compensatory damages and that Kuehl's increased tax liability may have resulted from the defendants' unjustified delay in distributing his benefits. The defendants also argue that the trial court erred in refusing to impose sanctions on the plaintiffs

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5. The Supreme Court's decision in *Ingersoll-Rand* does not change the result under either section 502(a)(1)(B) or section 502(a)(3). The "relief requested" in *Ingersoll-Rand,* which Justice O'Connor states is "within the power of the federal courts to provide," does include punitive damages. However, the argument against construing these dicta to mean that such damages may be recovered under ERISA is even stronger in the context of punitive damages than in that of compensatory damages; there is more circuit court precedent directly addressing the issue of punitive damages, and that precedent uniformly holds that such damages are not available under ERISA. Thus, it would be even more rash to conclude that the Court overruled all of this precedent without so much as a footnote reference to it, although again "plain meaning" may cut the other way.

under Fed. R.Civ. P. 11. The plaintiffs cross-appeal the district court's refusal to impose on the defendants statutory penalties provided by ERISA for failure to produce Plan documents upon request. Both parties challenge the court's calculation of the attorney's fees awarded to the plaintiffs.

We need not address the defendants' claims regarding jury trial and Kuehl's damages because they have been mooted by our holding in Part II that the plaintiffs' compensatory damages are not recoverable under ERISA. We discuss each of the other claims in turn.

A. *Rule 11 Sanctions*

The district court rejected the defendants' request for sanctions based on five motions filed by the plaintiffs during the first six months of the litigation, all of which were denied by the court. The district court found that, "[g]iven the heightened animosity and accompanying zeal marking this litigation, sanctions appear unwarranted." Order at 1-2 (Aug. 2, 1990). We review the district court's ruling on Rule 11 sanctions for "abuse of discretion." *Mars Steel Corp. v. Continental Bank N.A.*, 880 F.2d 928, 930 (7th Cir.1989) (en banc). This standard applies "whether sanctions were imposed or not." *Id.* The defendants have not shown that the district court abused its discretion by refusing to impose sanctions in this case. This court has stated that Rule 11 "is a law imposing sanctions if counsel files with improper motives or inadequate investigation." *Id.* at 932. The defendants have failed to establish that either of these factors was present here. The fact that the court denied several pre-trial motions filed by the plaintiffs does not necessarily import a violation of Rule 11. As we have observed, "Rule 11 focuses on . . . conduct rather than result." *Id.* Although the district court

noted that the plaintiffs' counsel had taken an "unyielding approach to discovery" at the outset of the litigation, Order at 3 (May 11, 1988), the court did not characterize any of the plaintiffs' motions as "frivolous." Nor did the judge find that any of them had been filed with "improper motives." The defendants do not point to any evidence in the record that compels either of these conclusions. We affirm the district court's denial of Rule 11 sanctions.

B. *Statutory Penalties*

The plaintiffs asked the district court to impose statutory penalties on the defendants as a sanction for the defendants' refusal to comply with the plaintiffs' repeated requests for information about the Plan. The district court denied the plaintiff's request, ruling that "[a]ny damage or prejudice suffered by the plaintiffs as a result of the defendants' failure to freely provide information . . . is directly reflected in the tardy payment of benefits, "for which the plaintiffs would receive compensatory damages. Order at 2 (Aug. 2, 1990). Thus, the court concluded, it was "unnecessary to consider imposing statutory penalties." *Id.* The plaintiffs contend that the district court's ruling is incorrect as a matter of law because the court focused on the question of actual prejudice or damage in denying penalties. We reject this argument.

Section 502(c) of ERISA clearly commits the determination whether or not to impose statutory penalties to the discretion of the district court. The statute provides:

> Any administrator . . . who fails or refuses to comply with a request for any information which such

> administrator is required by this subchapter to furnish to a participant or beneficiary . . . *may in the court's discretion* be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal . . .

29 U.S.C. § 1132(c)(1)(B) (1988) (emphasis supplied). The plaintiffs, however, argue that under our decision in *Ziaee v. Vest*, 916 F.2d 1204 (7th Cir. 1990), a district court abuses its discretion when it denies a request for penalties based on the injury suffered by the plaintiffs as a result of the defendants' violation. The plaintiffs' reliance on *Ziaee* is misplaced. In that case we reversed and remanded a district court judgment granting substantial statutory penalties on the ground that the court had not made sufficient findings to support the award. In the course of doing so, however, we rejected the defendants' claim that *no award* was permitted because the plaintiffs had not demonstrated injury from the delay. Rather, we said, "[t]he statute commits the size of the penalty to the district judge's discretion; the judge may, but need not, consider the provable injury when exercising that discretion." *Id.* at 1210. This statement is permissive rather than restrictive; the fact that the district court may award statutory penalties even when there is no provable injury by no means suggests that the court may not *deny* penalties when there *is* injury. contrary to the plaintiffs' argument, *Ziaee* reinforces rather than constricts the district court's discretion in this area.

In the case before us, however, the district court based its decision to deny statutory penalties on a fact that no longer obtains because of our reversal of the judgment as to compensatory damages. Therefore, we vacate the court's

judgment denying statutory penalties and remand for further proceedings consistent with this opinion.

C. *Attorney's Fees*

The plaintiffs sought attorney's fees in the amount of $146,000 under section 502(g)(1) of ERISA. Section 502(g)(1) provides:

> In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1) (1988). The district court granted the plaintiffs' request for fees, but awarded only $47,729.81 because it found the plaintiffs' billing records inadequate to allow the court to "exclude hours not 'reasonably expended.' " Order at 8 (Aug. 2, 1990). Therefore, the court decided to "determine the fee equitably," by treating the case "as one pursued on a contingent fee basis," and awarded the plaintiffs attorney's fees in an amount approximately one-third of their total recovery. *Id.* at 9. The plaintiffs argue that the district court's reduction of their attorney's fees constitutes an abuse of discretion. The defendants argue that the plaintiffs should receive far less than they were awarded by the district court because their action for compensatory damages was not one brought "under this subchapter" of ERISA. We address the defendants' contention first.

We agree with the defendants that the plaintiffs should not be able to recover attorney's fees for that portion of the litigation

that dealt with compensatory damages. In light of our analysis above, an action for compensatory damages resulting from a plan fiduciary's breach of fiduciary duty is not an "action under this subchapter [Title I]" of ERISA. The fact that this circuit had not previously resolved that issue does not change this result. The defendants should not have to bear a greater burden than the plaintiffs because of that uncertainty. On remand, then, the district court may award the plaintiffs only those fees reasonably attributable to claims that may be brought under ERISA: that is, claims for benefits due, statutory peanalties and the like.

The question remains, however, whether the district court on remand may use the same method to calculate the fee award that it did the first time around. We conclude that the district court's approach, though somewhat unorthodox, did not constitute an abuse of discretion. Nevertheless, we consider the lodestar method to be more appropriate in a case such as this one, and recommend that the court employ that approach on remand.

In *Kirchoff v. Flynn*, 786 F.2d 320 (7th Cir. 1986), we held that under appropriate circumstances a court could use contingent fees as a "benchmark" in making an award of attorney's fees under 42 U.S.C. § 1988. Judge Easterbrook, writing for the court, explained that:

> A court's objective is to find the rates "prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation." [citation omitted] When the "prevailing" method of compensating lawyers for "similar services" is the contingent fee, then the contingent fee is the "market rate."

Id. at 324. We think that, in certain cases, this reasoning may be equally applicable to the award of fees under ERISA. Both section 1988 and ERISA require the district court to determine a "reasonable" attorney's fee. We see no reason to conclude that using the "market rate" for services as a guideline is appropriate under section 1988 but not under the perhaps less plaintiff-oriented ERISA fee-shifting provision. *Cf. Bandura v. Orkin Exterminating Co.*, 865 F.2d 816, 822 (7th Cir.1988) (upholding district court's application of *Kirchhoff* "market rate" rule in determining a "reasonable attorneys' fee" under Illinois Consumer Fraud and Deceptive Practices Act). Therefore, if the plaintiffs' claims are of the type that in the private market would be the subject of a contingency agreement, the district court did not abuse its discretion in relying on a contingent fee standard in determining the appropriate attorney's fees.

Nevertheless, we recommend that the district court employ the lodestar method on remand if at all feasible. As the *Kirchoff* court noted: "[T]he use of contingent fees is appropriate in cases that enforce old precedents and allow effective compensation as a percentage of the total recovery," while "the lodestar approach is best in cases with substantial injunctive or precedent-creating components." 786 F.2d at 328. This case would seem to fall within the latter category.

IV.

For the foregoing reasons, we REVERSE the judgment awarding the plaintiffs compensatory damages and AFFIRM the dismissal of the plaintiffs' claims for punitive damages. We also AFFIRM the denial of sanctions under Fed.R.Civ.P. 11. We VACATE the denial of statutory penalties and the award of attorney fees and REMAND those issues for further proceedings consistent with this opinion.

Appendix E

FLAUM, Circuit Judge, concurring.

Although I agree with the judgment of the court, unlike the majority I am neither "reluctant" nor "dubious," *see ante* at 655, 656, in determining that extra-contractual damages are not available under either section 502(a)(1)(B) or section 502(a)(3) of ERISA. Supreme Court precedent and statutory interpretation, as well as the great majority of other circuits which have considered the issue, all point in the direction of excluding such damages. I would therefore find that extra-contractual damages are excluded without second-guessing the wisdom of policy determinations already made by Congress.

Part IIA contains numerous references to the "troubling" implications of excluding extra-contractual damages. It notes, for example, that "on grounds of policy and, perhaps, of justice," a good deal can be said for allowing extra-contractual damages under section 502. *Ante* at 658. In the abstract, that may be so. But ERISA, like all legislation, is the result of compromise and policy decisions. One of those decisions, as the Ninth Circuit observed in *Sokol v. Bernstein,* 803 F.2d 532, 537 (9th Cir.1986), was the determination "that the entire statute was aimed at the protection of the integrity of pension plans, rather than at direct protection of beneficiaries." The majority advances views as to the advisability of Congress's policy choice. In this context, I do not consider it appropriate or necessary to speculate on the merit of these congressional determinations. Regardless of whether we are "sympathetic" to allowing plaintiffs to recover extra-contractual damages in ERISA actions, *ante* at 659, given the relevant legislative history, statutory interpretation, and case law, they should be excluded.

Unlike the majority, I do not find the Sixth Circuit's attempt

in *Warren* to distinguish *Massachusetts Life Insurance Company v. Russell,* 473 U.S. 134, 147, 105 S.Ct. 3085, 3092-93, 87 L.Ed.2d 96 (1985), to be "well-intentioned." *Ante* at 658. Indeed, I find it somewhat disturbing that the court did not choose to follow the reasoning of the majority opinion in *Russell* "as setting a proper guide to follow rather than Justice Brennan's separate opinion which speaks for a minority of the Court." *Warren v. Society Nat'l Bank,* 905 F.2d 975, 984 (Wellford, J., dissenting). Such an approach merely "tampers with an enforcement scheme" crafted with evident care by ERISA's drafters. *See Russell,* 473 U.S. at 147, 105 S.Ct. at 3093. I would adhere to the Supreme Court's admonitions that "where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it. The presumption that a remedy was deliberately omitted from a statute is strongest when Congress has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Id.* (citations omitted).

Neither do I find persuasive the plaintiffs' argument that a single sentence of dicta authored by Justice O'Connor in *Ingersoll-Rand Company v. McClendon,* __ U.S. __ , 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), authorizes extra-contractual damages as a remedy under ERISA. I agree with those courts that find that "[S]uch a departure from precedent likely would not have been accomplished in a single sentence, in *dicta,* at the close of an opinion focused exclusively on a wholly different issue." *Gaskell v. Harvard Cooperative Soc'y,* 762 F.Supp. 1539, 1544 (D.Mass.1991) (emphasis in original). Indeed, given that Russell has been a cornerstone of the ever-growing jurisprudence barring extra-contractual damages under ERISA, it seems to me highly unlikely that the Supreme Court would reverse its course without so much as an attempt to distinguish or explain *Russell.* If the Court is intending to modify the state of the law in this area, it is doing so in a surprisingly murky manner.

APPENDIX F — JUDGMENT OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN DATED AUGUST 30, 1990

UNITED STATES DISRICT COURT
EASTERN DISTRICT OF WISCONSIN

CASE NUMBER: 87-C-1345

KATHALEEN A. BASSLER HARSCH, et al.,

Plaintiffs,

V.

ALAN D. EISENBERG, et al.,

Defendants.

JUDGMENT IN A CIVIL CASE

☐ Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment is entered in favor of plaintiffs and against defendants based on plaintiff Paula C. Miller's acceptance of a remittitur of compensatory damages in excess of $709.00; plaintiff Kathaleen Bassler-Harsch's acceptance of a remittitur in excess of $1.00; plaintiff Douglas M. Bihler's acceptance of a remittitur in excess of $4,800.00; and plaintiff Lisa P. Tallar-Kuehl's acceptance of a remittitur in excess of $3,110.00.

Appendix F

IT IS FURTHER ORDERED that judgment is entered in favor of Thomas D. Kuehl in the amount of $25,000.00.

IT IS FURTHER ORDERED that defendants' motions for a new trial on defendants' counterclaim be and the same is hereby denied; the jury's finding that Thomas Kuehl was not a fiduciary shall stand.

IT IS FURTHER ORDERED that defendants' motions for judgment notwithstanding the verdict and for a new trial on the issue of damages be and the same are hereby denied.

IT IS FURTHER ORDERED that defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 and plaintiff's motion for penalties pursuant to 29 U.S.C. § 1132(c) be and the same are hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion for fees pursuant to 29 U.S.C. § 1132(g)(1) is granted in the amount of $47,729.81 and plaintiffs' motion for costs pursuant to 29 U.S.C. § 1132(g)(2) is granted in an amount to be taxed by the Clerk of Court pursuant to Local Rule 9.

APPROVED: s/ J.P. Stadtmueller
Hon. J.P. Stadtmueller, U.S. District Judge

August 30, 1990
Date

SOFRON B. NEDILSKY
Clerk

s/ Valerie L. Hass
(By) Deputy Clerk

APPENDIX G — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN FILED AUGUST 2, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-C-1345

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER, and LISA P. TALLAR,

Plaintiffs,

vs.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C. The ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN, and ALAN D. EISENBERG, S.C., a Wisconsin corporation,

Defendants.

ORDER

The above-captioned matter comes before the court on defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11, and plaintiffs' motion for penalties, costs and attorneys' fees. Defendants' post trial motion is determined in a separate opinion.

As a preliminary matter, the court considers defendants' request for sanctions against plaintiffs. This request stems from several pretrial motions filed by plaintiffs and denied by the

court. As the court has previously indicated to counsel, it is not inclined to award sanctions. Given the heightened animosity and accompanying zeal marking this litigation, sanctions appear unwarranted. To the extent counsel might have been overzealous or filed unnecessary motions, these considerations are reflected in the court's decision on the motion for attorney's fees.

PENALTIES AND ATTORNEY'S FEES

Plaintiffs have moved to recover statutory penalties, pursuant to 29 U.S.C. § 1132(c), as well as attorney fees and costs, pursuant to 29 U.S.C. § 1132(g).

The penalty provision provides in part:

> Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary unless such failure or refusal results from matters reasonably beyond the control of the administrator . . . may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

29 U.S.C. § 1132(c).

Any damage or prejudice suffered by plaintiffs as a result of defendants' failure to freely provide information is directly reflected in the tardy payment of benefits. Even if they accept the

proposed remittitur in this case, plaintiffs will receive sizable compensatory damages. Considering the totality of circumstances, the court finds it unnecessary to consider imposing statutory penalties.

Turning to attorneys' fees, ERISA provides that "[i]n any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

The parties disagree about what standard the court should apply in determining whether to award attorney's fees. Plaintiffs wish the court to make the fee determination in light of five factors enunciated in a number of cases. *See, e.g. Bittner v. Sadoff & Rudoy Industries,* 728 F.2d 820, 828 (7th Cir. 1984). Defendants contend the appropriate standard is that a prevailing party is entitled to a reasonable attorney's fee unless the court finds that the losing party's position was substantially justified or that special circumstances make an award unjust. Noting that the five-factor test is oriented toward the case where plaintiff rather than defendant prevails, the *Bittner* court proposed the "substantial justification" standard advocated by defendant in this action. The court did not repudiate the five-factor test. The Seventh Circuit has implicitly recognized the tests as distinct. *Nichol v. Pullman Standard, Inc.,* 889 F.2d 115, 121 (7th Cir. 1989) ("Cases in this circuit subsequent to *Bittner* seem to have adopted both systems."). Moreover, some authority indicates that the appropriate test depends on which party prevails. "Recognizing that the five factors . . . relate more appropriately to the question whether attorney's fees should be awarded to a plaintiff rather than to a defendant, this court has suggested another standard to be applied to cases dealing with an award of

fees to a defendant." *Chicago Painters & Decorators Pension Fund v. Karr Brothers,* 755 F.2d 1285, 1292 (7th Cir. 1985) (citing *Bittner,* 728 F.2d at 828-30. Because the Seventh Circuit has not clearly repudiated the five-factor test, and appears to maintain a distinction in applying the two standards, this court will use the five factors for guidance in the present case.

The five factors are:

> (1) the degree of the offending parties' culpability or bad faith; (2) the degree of the ability of the offending parties to satisfy personally an award of attorney's fees; (3) whether or not an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions.

Janowski v. International Brotherhood of Teamsters, 673 F.2d 931, 940 (7th Cir. 1982), vacated on other grounds 463 U.S. 1222 (1983).

The first consideration is the degree of the offending party's culpability or bad faith. This factor and others must be viewed over time. Defendants state that the bulk of benefits owed were paid on January 15, 1988, and that a final minor disbursement was paid as a result of bookkeeping adjustments on March 3, 1988. Plaintiffs' attorney Staudenmeier contends in one affidavit (filed March 26, 1990) that an additional disbursement was made on April 21, 1988, but states in another affidavit (filed February 13,

1990) that vested benefits were received in January through March 1988. The jury was instructed that distribution was completed in March 1988. It appears undisputed that the first distribution constituted the bulk of the sums owed. It is reasonable to conclude that defendants' exhibited bad faith or culpability in engaging in litigation concerning entitlement to benefits that defendants concluded were owed. Any culpability or bad faith was substantially greater during the period before the onset of litigation and the initial distribution than after that distribution. Based on defendants' assertions, and in the absence of contradictory evidence, it also is reasonable to conclude that the one or two subsequent distributions were due to bookkeeping adjustments. Litigation following the initial payment largely concerned issues such as compensatory damages that defendants disputed in good faith.

The court must next consider defendants' ability to satisfy personally an award of attorneys' fees. Certainly it is not equitable to place any fee burden on the defendant plan, which evidently no longer exists. This court has previously concluded that the defendant service corporation was largely the alter ego of defendant Eisenberg. To whatever extent the corporation exists, it is not unfair to place the burden on the corporation. The record indicates that Eisenberg's income may have dropped significantly since the onset of this litigation. But the record also suggests that Eisenberg may have substantial assets with which to satisfy a judgment of attorneys' fees.

To the extent defendants clearly were culpable or acted in bad faith, the court concludes that an award of attorneys' fees would deter other persons acting in similar circumstances.

An award of attorneys' fees will confer no additional benefit

on members of the pension plan as a whole. The suit benefited a specific group of beneficiaries under particular circumstances surrounding their departure from employment.

Finally, the relative merits of the parties' positions must be viewed in a broad context. Certainly the merits clearly favored plaintiffs as to the payout of benefits clearly owed. After the distributions, the parties litigated highly debatable issues. The court allowed a jury trial, a matter itself subject to continuing debate. Though plaintiffs prevailed, the circumstances warranted remittitur.

On balance, the court finds that an award of attorneys' fees is appropriate. It might be argued that fees should not be awarded for the period subsequent to the date on which vested benefits were paid. Subsequent litigation essentially involved compensatory damages, an issue on which defendants maintained an arguable position in good faith. But had benefits been paid in the first instance, no litigation would have been necessary. With defendant unwilling to settle after paying the benefits, plaintiffs may reasonably have felt compelled to seek compensatory damages (though attorneys' fees ultimately constituted the great majority of the amount actually in dispute). Because the court, for reasons discussed below, is compelled to determine the fee award based on broad considerations, treating the case as a whole appears the wisest course.

In the same vein, plaintiffs should not be awarded attorneys' fees on a number of motions on which they did not prevail. While the court has concluded that sanctions are inappropriate, several motions were nonetheless not helpful to the efficient resolution of this matter. Particularly in the early stages, acrimony appears to have driven both sides of this dispute. Having noted these

considerations, the court turns to determining the fee.

The basic calculation of an appropriate fee award is "the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate." *Hensley v. Eckerhart,* 461 U.S. 424, 433 (1983). The resulting lodestar amount is presumed to be a reasonable fee. *Blum v. Stenson,* 465 U.S. 886, 897 (1984).

Plaintiffs claim the following fees:

	Hours	Hourly Rate	Total
L. William Staudenmaier	222.5	$140-$175	$34,732.00
Brian C. Tyndall	783.25	$80-$125	$85,645.00
Victor Schultz	112	$65-$85	$7,950.00
Other Attorneys	34.25	$60-$100	$2,610.00
Paralegals and Clerks	315.5	$40-$50	$15,095.00
Total			$146,032.00

The ranges of hourly rates reflect rate changes over time.

To assist the court in assessing attorneys' fees,

> [t]he party seeking an award of fees should submit evidence supporting the hours worked and rates claimed. Where the documentation of hours is inadequate, the district court may reduce the award accordingly.

The district court also should exclude from this initial fee calculation hours that were not "reasonably expended." S.Rep. No. 94-1011, p.6 (1976). Cases may be over staffed, and the skill and experience of lawyers vary widely. Counsel for the prevailing party should make a good-faith effort to exclude from a fee request hours that are excessive, redundant, or otherwise unnecessary, just as a lawyer in private practice ethically is obligated to exclude such hours from his fee submission. "In the private sector, 'billing judgment' is an important component in fee setting. It is not less important here. Hours that are not properly billed to one's client also are not properly billed to one's *adversary* pursuant to statutory authority." *Copeland v. Marshall,* 205 U.S. App. D.C. 390, 401, 641 F.2d 880, 891 (1980) (en banc) (emphasis in original).

The product of reasonable hours times a reasonable rate does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee upward or downward, including the important factor of the "results obtained." This factor is particularly crucial where a plaintiff is deemed "prevailing" even though he succeeded on only some of his claims for relief. In this situation two questions must be addressed. First, did the plaintiff fail to prevail on claims that were unrelated to the claims on which he succeeded? Second, did the plaintiff achieve a level of success that

makes the hours reasonably expended a satisfactory basis for making a fee award?

Hensley v. Eckerhart, 461 U.S. 424, 433-34 (1983).

The evidence submitted by plaintiffs is plainly inadequate to assist the court in its task. For the most part, plaintiffs directly provided the court with broad figures for total hours billed and amounts charged. Defendants have provided copies of more detailed records obtained from plaintiffs' counsel. "Plaintiffs' counsel, of course, is not required to record in great detail how each minute of his time was expended, but at least counsel should identify the general subject matter of his time expenditures." *Hensley*, 461 U.S. at 437. Plaintiffs cite this wisdom as support for the adequacy of the billing records. But individual entries in counsel's "Billed Audit Trail" lump together a number of activities, making it impossible for the court to determine the amount of time spent on specific conferences, research sessions, telephone conversations and other activities. In a letter to plaintiffs' counsel, defense counsel sought particular information of this nature. The questions and answers, provided to this court, reveal that plaintiffs' counsel is unable to add significant clarity to the records.

Counsel's records make it impossible for the court to exclude hours not "reasonably expended." The court finds little cause to dispute the range of rates counsel presents for the various attorneys who worked on this case. The rates reflect varying expertise and levels of experience, which are not disputed. The court's challenge is discerning "hours that are excessive, redundant, or otherwise unnecessary." Plaintiffs' counsel exercised little or no billing judgment in this case: nearly every hour recorded is clearly included in the fee request. It is

extremely unlikely that plaintiffs would have agreed to pay a fee nearly equal to their total recovery, including both vested benefits and jury award prior to the proposed remittitur.

Plaintiffs did obtain very good results in this litigation. Filing this suit set off the course of events resulting in distribution of vested benefits. And plaintiffs received generous compensatory damages, even assuming acceptance of remittitur.

Ordinarily, the court would consider the amount of time devoted to various activities or phases of the litigation, and make any appropriate adjustments. The inadequacy of plaintiffs' documentation obliges the court to make an appropriate reduction of the hours claimed. Accurate detailed findings regarding hours spent on various activities are out of the question. Any attempt to parse hours would be extremely speculative. The court will not perform counsel's record keeping function. Carefully recording time spent and compiling hours devoted to various functions may be odious tasks. But care is particularly necessary where attorneys are making fee claims. Plaintiffs' counsel has not provided useful samples from which the court might attempt extrapolation. The inadequacy of plaintiffs' counsel's submission is such that the fee claim might be rejected entirely.

Instead, the court will determine the fee equitably, in light of the court's familiarity with the litigation. In short, the court will treat this case as one pursued on a contingent fee basis. The usual contingent fee in this district is one third the final recovery. The case was reasonably complex, but this complexity is reflected in counsel's employment of attorneys, paralegals and clerks possessing various degrees of experience and kinds of expertise. Moreover, plaintiffs' counsel pursued this case with excessive

zeal, reflected in unparalleled vexatiousness evident throughout the litigation. These factors could only hinder efficient resolution of this matter and would inevitably result in a significant fee reduction. That defendant Eisenberg might arouse such passion in attorneys is not the issue. Plaintiffs' counsel are responsible for their own self-control. Excessive zeal to the point of overkill often proves a disservice to one's client. Plaintiffs will be awarded attorneys' fees in the amount of one-third the vested benefits recovered and one-third the jury award after the remittitur offered by the court.

After remittitur, the jury award to plaintiffs amounts to $33,620. Additionally, plaintiffs collectively received plan benefits in the amount of $109,569.43, for a total benefit from this litigation of $143,189.43. One-third this amount is $47,729.81, the fee that will be allowed. The court reaches its conclusion reluctantly, recognizing that it does not comport with the Seventh Circuit's preferred method of calculation. Given the state of counsel's records and counsel's inability to provide clarity, a more specific determination is simply unattainable.

Finally, plaintiffs' request for costs will be granted. Costs are allowed and taxed by the clerk of court pursuant to 29 U.S.C. § 1132(g)(2) and Local Rule 9, shall be awarded plaintiffs.

Therefore,

IT IS ORDERED that defendants' motion for sanctions pursuant to Fed. R. Civ. P. 11 be and the same is hereby DENIED; and,

IT IS FURTHER ORDERED that plaintiffs' motion for penalties pursuant to 29 U.S.C. § 1132(c) be and the same is hereby DENIED.

Appendix G

IT IS FURTHER ORDERED that plaintiffs' motion for fees pursuant to 29 U.S.C. § 1132(g)(1) is GRANTED in the amount of $47,729.81; and,

IT IS FURTHER ORDERED that plaintiffs' motion for costs pursuant to 29 U.S.C. § 1132(g)(2) be and the same is hereby GRANTED in an amount to be taxed by the clerk of court pursuant to Local Rule 9.

Dated at Milwaukee, Wisconsin this 2nd day of August, 1990.

BY THE COURT:
s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge

APPENDIX H — ORDER OF THE UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF WISCONSIN FILED AUGUST 2, 1990

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

Case No. 87-C-1345

KATHALEEN A. BASSLER HARSCH, DOUGLAS M. BIHLER, THOMAS D. KUEHL, PAULA C. MILLER, and LISA P. TALLAR,

Plaintiffs,

vs.

ALAN D. EISENBERG, Individually and as Trustee and Administrator of the Alan D. Eisenberg, S.C. Pension and Profit Sharing Plan, and as President and Sole Director of Alan D. Eisenberg, S.C. The ALAN D. EISENBERG, S.C. PENSION AND PROFIT SHARING PLAN, and ALAN D. EISENBERG, S.C., a Wisconsin corporation,

Defendants.

ORDER

Following trial of the above-captioned matter, the jury returned a verdict for plaintiffs. The jury awarded $7,500 in compensatory damages to each of four plaintiffs, and $25,000 to plaintiff Thomas Kuehl. In addition, the jury found against defendants on their counterclaim against Kuehl. The matter is now before the court on defendants' motions following the verdict. Plaintiffs' motion for attorneys' fees and costs, as well as defendants' motions for sanctions, will be subject of a separate decision.

Appendix H

I. DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

Defendants move for judgment not withstanding the verdict, arguing that the verdict is excessive and that plaintiffs are not entitled to claim extra-contractual damages as a matter of law.

The court has already rejected defendants' argument that compensatory damages are not available under ERISA, and circumstances do not warrant revisiting the question at this juncture. Instead, the court will focus on the argument that the verdict was excessive.

The standard for deciding a judgment notwithstanding the verdict motion was set forth succinctly by Judge Gordon in *Cornelius v. La Croix*, 631 F.Supp. 610 (E.D. Wis. 1986):

> [T]he court must consider whether the evidence presented, combined with all reasonable inferences that can be drawn from it, is sufficient to support the verdict when viewed in the light most favorable to the prevailing party. *Syvock v. Milwaukee Boiler Mfg. Co.*, 65 F.2d 149, 153 (7th Cir.1981). A court may not judge the credibility of the witnesses or reweigh the evidence to find a preponderance on one side or the other. *La Montagne v. American Convenience Products, Inc.*, 750 F.2d 1405, 1410 (7th Cir.1984). The court, however, will consider whether the evidence to support the verdict is substantial: "a mere scintilla of evidence will not suffice." *Id.*

Id. at 615-16.

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Defendants argue that, at most, a higher rate of interest than that which plaintiffs earned under the plan could be assessed for the period during which they awaited distribution. Accordingly, defendants ask that judgment notwithstanding the verdict be granted, striking or reducing the award. Because the jury award exceeds the amount payable for any such additional interest, defendants contend, it is excessive and represents improper recovery for punitive and extra-contractual damages. Defendants do not discuss the evidence relating to damages in support of their judgment notwithstanding the verdict motion. While the amount of damages might be considered on a motion for judgment notwithstanding the verdict, such a motion focuses most clearly on liability issues.

Instead, defendants appear to argue that if compensatory damages are available as a matter of law, then a new trial or remittitur must be granted because there is no rational connection between the evidence and the verdict. This question is governed by a broad standard:

> "The authority to grant a new trial . . . rests almost completely within the trial court's discretion. A new trial is warranted to prevent a miscarriage of justice if the district court determines that the jury verdict is contrary to the clear weight of the evidence, the damages are excessive, or, for any other reason, the trial was not fair to the moving party. A new trial is not justified merely because the jury could have reached a different result.

Cornelius, 631 F.Supp. at 616 (citations omitted).

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The jury in this case was presented with conflicting, and even confusing, evidence. It is noteworthy at the outset that, though plaintiffs' individual circumstances varied, $7,500 in compensatory damages was awarded each plaintiff except Thomas Kuehl, who was awarded $25,000.

Plaintiffs contend that certain evidence common to all plaintiffs fully supports the damage award. In particular, plaintiffs contend they were humiliated and insulted by defendants after leaving Eisenberg's employ and seeking disbursement of benefits. However, while plaintiffs' testimony at trial reflected vexation and frustration, it generally fell short of clearly demonstrating any actual damages, much less damages in the amounts awarded. Like the parties, the court will consider separately the evidence relating to each plaintiff's damages.

Paula Miller

Paula Miller's distribution under the plan was $5,264.55. Miller testified that if paid earlier she would have used the money to pay off her credit card balance, which was accruing 18 percent interest. The plan paid 4 percent interest on Miller's money. Defendants contend that Miller's maximum loss was an annual interest expense of approximately 14 percent on 90 percent of her plan balance over the 15 month period, of delay claimed by Miller, resulting in damages of approximately $709.00.

Plaintiffs do not dispute this calculation. They do point out that Miller used a portion of her distribution to buy a house, arguing that the jury could have concluded that Miller would have purchased a home earlier with timely distribution. However, plaintiffs do not point to any evidence that Miller would have purchased a home sooner under different circumstances, or that

she suffered any actual loss in not having the money available sooner to apply toward a house purchase. Accordingly, Miller's damages are remitted to $709.00.

Kathaleen A. Bassler Harsch

Kathaleen Bassler Harsch offered no evidence of actual loss resulting from a delay in her distribution of $1,133.19. Since she placed the money into her checking account, it is not clear she would have received any interest on it. Plaintiffs merely argue that the jury could conclude she would have been able to use her distribution earlier if it had been distributed on time. This assertion may be true as a general proposition. But the evidence suggests no use of the money that rationally translates to a roughly measurable loss (much less a loss of $7,500) due to a delay in receiving the distribution. Since plaintiffs do not dispute that the money was earning some interest prior to distribution, Bassler Harsch's damages are remitted to a nominal $1.00.

Douglas M. Bihler

After ceasing employment with Eisenberg's firm, Bihler established his own law practice. He claimed that because of the delay in payment of $5,354.69 due him under the plan, he was unable to afford a secretary for approximately four months. As a result, he spent time doing nonbillable secretarial work that could otherwise have been spent doing billable legal work. Defendants contend that Bihler claimed damages of approximately $4,800.00: plaintiffs suggest that this amount was offered in closing argument as a conservative estimate, but that the actual loss could have exceeded $10,000 at Bihler's billing rate. Further plaintiffs argue that Bihler would have had other uses for the money, including modernizing his offices and increasing its

efficiency. Since he actually received the money after his law practice was through the start-up phase, he and his wife used the funds to buy a house.

It is not clear that the delay in payment caused Bihler to suffer any actual loss in delaying a house purchase or making expenditures for his law practice. Moreover, the amount awarded by the jury bears no recognizable relation to the damages claimed, particularly in light of the fact that he was awarded a sum identical to the other plaintiffs whose benefits and personal circumstances significantly differed. In light of these considerations, the court will order a remittitur to plaintiffs' assertedly "conservative" estimate of $4,800.00.

Lisa P. Tallar Kuehl

Lisa Tallar Kuehl claims that delay in payment caused her distribution to be subject to relatively unfavorable provisions of the Tax Reform Act of 1986. Her resultant alleged loss was $3,110.00. The evidence does not support any additional damage amount.

The parties dispute evidence concerning expert testimony. They also dispute tax effects as an element of compensatory damages. The court will not enter into this debate; defendants did not raise this issue in requesting jury instructions, though it clearly was central to plaintiffs' damages case.

Thomas D. Kuehl

Thomas Kuehl's distribution under the plan was $87,974.00. The jury awarded Kuehl $25,000.00. Like Tallar-Kuehl, he claims that late distribution deprived him of the benefit of

relatively favorable tax laws, resulting in increased tax liability. His net claimed loss was $27,892.00.

Again defendants argue that tax consequences are an improper damage consideration. Defendants also argue that Kuehl was not actually entitled to distribution prior to the effective date of tax law changes in question. They contend that Kuehl could have avoided any detrimental tax effects by rolling over the funds into an IRA account. Plaintiffs point out that because part of the tardy distribution was in the form of loan forgiveness, he did not receive all the money as cash that he could place in an IRA.

The jury heard conflicting evidence on most of the issues. Moreover, the jury heard expert testimony that Kuehl's damages exceeded those actually awarded. The court will not order remittitur as to this amount. However, while plaintiffs' circumstances and vested benefits there is also much similarity concerning measurement and proof of damages. On the whole, it is impossible to reconstruct the jury's calculations of any of the damage awards. Circumstances strongly suggest a lack of rational connection between the awards and the evidence as to some or all plaintiffs. The jury was clearly instructed not to award punitive damages or attorneys' fees and costs, but the obvious disparity suggests they may have made such an award. To the extent the court is able to discern a reasonable adjustment of the amounts awarded, plaintiffs Paula Miller, Kathaleen Bassler Harsch, Douglas Bihler and Lisa Tallar Kuehl will be offered a choice between remittitur to the maximum amount the court finds a reasonable jury could have awarded and a new trial on damages issues.

Two minor matters are worthy of note concerning the

damage awards. Defendants contend that plaintiffs failed to plead the special circumstances underlying their damage claims in violation of Fed. R. Civ. P. 9(g). However, the complaint pleaded facts supporting the damage claims with sufficient specificity to inform the defendants of the claimed nature and extent of damages, and to enable defendants to adequately respond.

Defendants also contend that plaintiffs, in closing argument, improperly invited the jury to make a speculative or punitive damage award by asking the jury to "send the defendants a message." There is no reason to think actual prejudice was caused by the closing remarks of plaintiffs' counsel. The court carefully instructed the jury against both speculation and awarding punitive damages. The irrational consistency of four out of five awards, defendants' chief evidence that the closing argument was prejudicial, may have had other causes, such as plain confusion.

The Counterclaim

Defendants also seek a new trial on their counterclaim, pursuant to Fed. R. Civ. P. 59(a), contending the jury's finding that Thomas Kuehl was not a fiduciary is against the clear weight of the evidence.

On this issue, too, the jury faced conflicting evidence. Documents and testimony at trial indicate that Kuehl was at least a nominal contact for plan accountants and attorneys. However, the jury was forced to weigh the credibility of conflicting evidence as to whether Kuehl actually had discretionary authority over the plan. The court will not disturb the jury's conclusion on this issue.

Therefore,

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IT IS ORDERED that defendants' motion for judgment notwithstanding the verdict be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that defendants' motion for a new trial on defendants' counterclaim be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that defendants' motion for a new trial on defendants' counterclaim be and the same is hereby DENIED; and

IT IS FURTHER ORDERED that defendants' motion for a new trial on the issue of damages be and the same is hereby DENIED on the condition that plaintiffs accept a remittitur of compensatory damages awarded to Paula L. Miller in excess of $709.00; to Kathaleen Bassler-Harsch in excess of $1.00; to Douglas M. Bihler in excess of $4,800.00; and to Lisa P. Tallar-Kuehl in excess of $3,110.00; and,

IT IS FURTHER ORDERED that in the event the affected plaintiffs do not accept, serve and file the remittitur within thirty (30) days from the date of this order, the case will be placed on the court's calendar for a scheduling conference.

Dated at Milwaukee, Wisconsin this 2nd day of August, 1990.

BY THE COURT:
s/ J.P. Stadtmueller
J.P. Stadtmueller
U.S. District Judge